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THE
ALL INDIA REPORTER

1915

ALLAHABAD SECTION

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THE ALL INDIA REPORTER

1915 ALLAHABAD COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I—This Table shows serially the pages of INDIAN LAW REPORTS, for the year 1915 with corresponding references of the ALL INDIA REPORTER.

Table No. II—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1915 with corresponding references of the ALL INDIA REPORTER.

Table No. III—This Table is the converse of the First and Second Tables. It shows serially the pages of the ALL INDIA REPORTER for 1915 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing serially the pages of INDIAN LAW REPORTS, ALLAHABAD SERIES for the year 1915, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 37 ALLAHABAD.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

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N. B.—Column No. 1 denotes pages of others JOURNALS.

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TABLE No. III

Showing serialim the pages of ALL INDIA REPORTER, 1915 ALLAHABAD, with corresponding references of other REPORTS, JOURNALS and PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1915 Allahabad.
Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

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150	37 All 573	199	37 All 515		29 I C 994		16 Cr L J 457
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305	37 All 452		30 I C 830		30 I C 578	420	37 All 531
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310 (2)	13 A L J 635		16 Cr L J 817		31 I C 716		30 I C 947
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321	29 I C 710		30 I C 134	400	37 All 535		13 A L J 975
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324	29 I C 478	356	37 All 471		13 A L J 753		16 Cr L J 815
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329	13 A L J 651		13 A L J 594	409	37 All 583	439	37 All 650
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334	37 All 600		16 Cr L J 593		13 A L J 793		16 Cr L J 58
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	31 I C 823		30 I C 551		13 A L J 1084		32 I C 136
	16 Cr L J 807	464	13 A L J 1046	480	37 All 634		17 Cr L J 8
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ALLAHABAD HIGH COURT

A. I. R. 1915 Allahabad 1 (1)

CHAMIER AND PIGGOTT, JJ.

Kanhai Lal and another—Plaintiffs—
Applicants

v.

Mul Chand and others—Defendants—
Respondents.

Civil Revn. Appln. No. 138 of 1914,
decided on 14th December 1914, from the
decree of offg. Sub J., Shahjahanpur, dated
26th June 1914.

*Civil P. C. (5 of 1908), S. 115—Refusing amend-
ment of decree on interpretation of decree—No
irregularity even if wrong—No revision lies.*

When a Subordinate Judge, holding that the
expression "future interest" used in a decree
means interest from the date of decision and not
from the date of the institution of the suit, dis-
allows an application for the amendment of the
decree, he commits no irregularity; and whether
he is right or wrong, the High Court has no juris-
diction to interfere in revision. [P. 1, C. 2.]

Lalit Mohan Banerjee—for Applicants.
Gulzari Lal—for Respondents.

Judgment.—This is an application for
revision of an order of the Subordinate
Judge of Shahjahanpore declining to amend
a decree. The applicants suing on a mort-
gage claimed Rs. 16,851-1-6 on account of
principal and interest up to the date of
suit. They asked for future interest, that
is, interest after the date of the institution
of the suit. The Court "decreed the claim"
with costs, and six per cent. per annum
future interest." The office prepared a
decree which declared that Rs. 16,851-1-6
on account of principal and interest and
Rs. 204 on account of costs, total
Rs. 18,055-1-6, were due to the plaintiffs
on January 9th, 1914, that is the date on
which the suit was decided and allowed the
plaintiffs' interest on the last-mentioned
sum from that date till realization at the

rate of six per cent. per annum. The
plaintiffs by an application which appears
to have been prepared on January 20th,
1914, but was not filed until April 21st,
1914, asked the Court to amend the decree,
which they said was not in accordance
with the judgment. They contended that
the judgment allowed interest from the date
of the suit up to the date of realisation on
the amount claimed. The Subordinate
Judge says: "From the perusal of the
judgment it appears that the Court did not
allow interest from the institution up to
the date of the decree and, therefore, the
decree is all right," and the application was
disallowed. Thus it appears the Subordin-
ate Judge construed the expression "future
interest" to mean interest from the date
of decision, and not from the date of the
institution of the suit. He may have been
wrong and the Court when deciding the
case may have intended to allow interest
from the date of the institution of the suit;
but it is impossible to say that the Sub-
ordinate Judge has acted irregularly. He
had jurisdiction to decide wrongly as well
as to decide rightly; and whether he was
right or whether he was wrong, we are
unable to entertain this application in
revision. We, therefore, dismiss it with
costs.

Application dismissed.

A. I. R. 1915 Allahabad 1 (2)

RICHARDS, C. J. AND BANERJEE J.
T. O. Mukerji—Plaintiff-Appellant

v.

Afzal Beg and others—Defendants—
Respondents.

First Appeal No. 145 of 1913, decided
on 17th December 1914, from the decision
of the Sub-J., Dehra Dun,

Lakshmi Narayan Tewari—for Appellant.

Beni Madho Ghose—for Respondents.

Judgment.—A suit brought by the respondent, Babu Ram, for possession of movable and immovable property was settled by an agreement, dated November 17th, 1906, and duly registered, whereby the property there in suit was charged with the payment of an annuity of Rs. 200 to Babu Ram. In 1908 Babu Ram obtained a decree for arrears of the annuity against Brij Mohan, father of the respondent Badri, and in execution thereof part of the property, namely, a *birt jijmani*, some old book containing the names and genealogies of the clients (*jijman*) and a flag were brought to sale. The *birt jijmani* and the book were purchased by Babu Ram himself and the flag was purchased by the appellant Ganesh.

The appeal now before us arises out of a second suit brought by Babu Ram for recovery of further arrears of the annuity by sale of the movable and immovable property charged by the agreement of 1906. Brij Mohan (since deceased) and his son, the respondent Badri, were impleaded as the persons in possession of the immovable property and the appellant, Ganesh, was impleaded as the purchaser in possession of the flag. The claim was decreed by the first Court and its decision was confirmed by the lower Appellate Court. This is a second appeal by the defendant, Ganesh, in which he repeats all the pleas put forward by him unsuccessfully in the Courts below.

His first point is that the flag having been once brought to sale by the respondent, Babu Ram, cannot be brought to sale by him again. It was indeed suggested that moveable property cannot be charged with the payment of an annuity, but such a contention cannot be accepted. In the case of *Sahib Mirza v. Umda Khanum* (1) both moveable and immovable property was charged with the payment of an annuity. The property was sold repeatedly subject to the annuity in execution of decrees passed for arrears of the same, and there were many suits between the annuitants and the holders of the property and between the holders of the property *inter se*. *Sahib Mirza v. Syed*

Muhammal (2) is an example of them. It is clear that moveable as well as immovable property—at all events moveable property which is not perishable or necessarily consumed by use—may be effectively charged with the payment of an annuity and may be sold subject to the charge, even in execution of a decree for arrears of the annuity. The property now in question is of a peculiar character. The flag is one of those used by *Pragwals* at the confluence of the Ganges and the Jumna for the purpose of attracting pilgrims. Each flag bears a distinctive device which may be recognized by an old client. His flag and his books are the ordinary paraphernalia or stock in trade of the owner of a *birt jijmani*. Together, the *birt jijmani*, the books and the flag, often form a valuable property, and we may assume for the purpose of this case that such property may be charged with the payment of an annuity and may be sold subject to that charge, even in execution of a decree for arrears of the annuity. This brings us to the appellant's second point, namely, that the flag was not sold to him subject to the annuity and that the respondent, Babu Ram, is by his conduct estopped from asserting that it was. Babu Ram was, of course, not bound to have the flag sold subject to the annuity.

It was open to him to have it sold free of the charge, and such a course would often be advantageous to the owner of the annuity in the case of moveable property of a wasting character—whether by accident or design, it appears that nothing was said about the property remaining subject to the charge. The case appears to be analogous to those cases in which it has been held that a person who brings property to sale in execution of a decree, without disclosing the existence of a mortgage which he holds on the property, cannot afterwards set up the mortgage against the purchaser, at all events where the purchaser had no notice of the mortgage, see, for example; *Hamid-ul-din v. Shib Sahai* (3); *Jagannath v. Gangi Reldi* (4); *Kasturi v. Venkatesh Chalapathi* (5) and *Ramchandra v. Jiram* (6). It is not

(2) Select case No. 305.

(3) [1899] 21 All. 309=1899 A. W. N. 87.

(4) [1892] 15 Mad. 303.

(5) [1892] 15 Mad. 412.

(6) [1898] 22 Bom. 686.

(1) [1892] 19 Cal. 444=19 I. A. 93 (P. C.)

suggested that the appellant had any notice of the charge, or that there was anything to lead him to suspect that the flag was being sold subject to a continuing charge for an annuity. On the contrary Babu Ram's own action in allowing the *birt* and the books to be sold separately from the flag suggested that he intended that the flag, the *birt* and the books should all be sold free of the charge for the annuity, for the flag without the *birt* and the books will produce no income. For these reasons we are of opinion that the flag held by the appellant was sold to him free of the charge for the annuity and that the respondent, Babu Ram, is estopped from contending the contrary.

We decree the appeal and dismiss the suit as against the appellant with costs throughout.

Appeal decreed.

A. I. R. 1915 Allahabad 5 (1)

RICHARDS, C. J., AND BANERJEE, J.

Wilayat Ali Khan and another—Plaintiffs—Appellants

v.

Ghani Khan and another—Defendants—Respondents.

Second Appeal No. 65 of 1914, decided on 22nd January 1915, from the decision of the Sub-J., Farrukhabad, dated 25th July 1913.

Practice—Appeal—Suit decided by Munsif though filed in Subordinate Judge's Court—Appeal heard by latter on transfer from District Judge is valid.

A suit was filed in the Court of the Subordinate Judge, but was subsequently transferred to the Court of the Munsif who heard and decided it. On appeal the District Judge transferred the case to the Subordinate Judge to hear the appeal.

Held, that the Subordinate Judge had jurisdiction to hear the appeal. [P. 5, C. 1 & 2.]

S. N. Sen—for Appellants.

Gulzari Lal—for Respondents.

Judgment.—The first contention raised in this appeal is that the learned Subordinate Judge who heard the appeal was not competent to do so. The basis of this contention is that the suit when originally filed was filed in the Court of the Subordinate Judge having regard to its valuation. Subsequently the jurisdiction of the Munsif to hear suits of that value was extended and the suit was accordingly transferred to the file of the Munsif. It is admitted that the case was never tried by the Subordinate Judge. An appeal from

the decision of the Munsif was presented in the Court of the District Judge who transferred it to the Subordinate Judge, and the learned Subordinate Judge heard the appeal. There can be no doubt that the appeal from the Munsif's decree lay to the Court of the District Judge and that the District Judge was competent to transfer it to the Subordinate Judge. Upon such transfer being made the learned Subordinate Judge had full jurisdiction to hear the appeal. There was nothing to preclude the Subordinate Judge from hearing the appeal and the mere fact that at one time the plaint had been presented in his Court does not take away his jurisdiction to hear the appeal.

The next point urged raises a question of fact which is concluded by the finding of the Court below.

The appeal, therefore, fails and is dismissed with costs, including in this Court fees on the higher scale.

Appeal dismissed.

AI. R. 1915 Allahabad 5 (2)

RICHARDS, C. J., AND BANERJI, J.

Gaya Prasad Tewari and others—Defendants—Appellants

v.

Ram Phal Misir—Plaintiff—Respondent.

First Appeal No. 151 of 1913, decided on 13th January 1915, from a decree of the Sub-Judge, Gorakhpur.

(a) *Hindu Law—Alienation—Burden of proof of necessity is on plaintiff to make mortgage by some members binding on family.*

Where certain members of a joint Hindu family executed a mortgage of the joint family property and a suit was brought to enforce the mortgage as against the entire family of the executors :

Held, that it was for the plaintiff to prove that the debt was borrowed for family necessity and that there was necessity to borrow it at a high rate of interest stipulated in the deed.

[P. 6, C. 1 & 2.]

(b) *Hindu Law—Alienation—Payment of Government revenue is family necessity.*

Money borrowed and utilized in payment of Government revenue amounts to a debt borrowed for family necessity. [P. 6, C. 2.]

(c) *Hindu Law—Alienation—Family property can be brought to sale for so much debts as are of necessity.*

The family property can in a mortgage suit be brought to sale for such amount of the debt as the Court finds to have been borrowed for legal necessity. [P. 6, C. 2.]

Motilal Nehru and Brij Nath Vyas—for Appellants.

Tej Bahadur Sapru, Iswar Saran and Rama Kant Malaviya—for Respondent.

Judgment.—This appeal arises out of a suit on foot of a mortgage, dated the 19th of May 1899. The principal amount was Rs. 722. The interest was 1-8, per cent. per month, compound interest, with annual rests. The claim has now swelled to the large sum of Rs. 6,207-6-0. The Court below has held that the full amount was borrowed and that there was family necessity and has granted a decree. The mortgage was executed by Lachmi Prasad Tewari and Gaya Prasad Tewari. The defendants are the entire joint family of Lachmi Tewari and Gaya Prasad Tewari, who are brothers. One of the defendants, Badri Prasad Tewari, is the brother of Lachmi Prasad and Gaya Prasad, who was a minor at the time the bond was executed. Lachmi Prasad, in his written statement, admitted that he executed the bond, but said as to Rs. 300-5-0, part of the consideration, that he had never received it. Gaya Prasad Tewari pleaded that he was a minor at the time that the bond was executed and that he knew nothing about it. The other defendants pleaded that there was want of consideration and that there was no family necessity. On these pleas it lay upon the plaintiff to prove not only that the bond was executed, but that there was family necessity and that the full amount of the consideration was duly paid. We find that part of the consideration was a sum of Rs. 421-11-0, alleged to be due for a previous debt, namely, a bond dated the 14th of October 1898. Looking at this bond we find that it was executed by Lachmi Prasad alone and in consideration of two sums, one of Rs. 353 paid in cash and Rs. 22-10-9 due upon foot of another bond, dated *Magh Badi* 1st, 1302 *Fasli*. This bond is also on the record. It was a bond for Rs. 17, found to be due for a debt of the grandfather of Lachmi Prasad. There is no evidence to show that the Rs. 53, was for any family necessity. We think, however, that it is proved that the Rs. 22-10-9 was for family necessity. The balance of the consideration was Rs. 300-5-0. This is said to have been wanted for the payment of Government revenue. The evidence as to the payment of the money is not altogether satisfactory. Gaya Prasad and Lachmi Prasad deny having received the amount, though

they admit that it was required. However after considering the evidence and what has been put forward on each side, we do not feel justified in holding that this sum of Rs. 300-5-0 was not received. If it was received and utilized for the payment of Government revenue it would amount to family necessity. It appears that shortly after the date of the bond the Government revenue was in fact paid. We, therefore, find that Rs. 300-5-0 and Rs. 22-10-9 was for family necessity, but no necessity has been proved for raising the remaining part of the loan. It must be remembered that we are not dealing with the case of a father's debts. The sum of Rs. 421-11-0 was alleged to have been given to Lachmi Prasad, the brother of Gaya Prasad and Badri Prasad. It remains to be considered whether there was any necessity to borrow at the high rate of 18 per cent. per annum compound interest. In our opinion no necessity for borrowing at this rate has been proved.

It is contended, on behalf of the respondents, that as Lachmi Prasad has not appealed the decree of the Court below should stand against him. In our opinion this contention is not sound. The family property can in a mortgage suit only be brought to sale for such amount as the Court finds there was family necessity for.

We accordingly must vary the decree of the Court below by giving a decree for Rs. 322-15-9 together with simple interest at the rate of 18 per cent. per annum from the date of the mortgage up to the time hereby fixed for payment. This sum together with costs in all Courts proportionate to this amount will be realised by sale of the mortgaged property. We fix six months from this date for payment. After the date so fixed for payment interest will run at the rate of 6 per cent. per annum. The decree will be drawn up in the usual form.

Decree modified.

A. I. R. 1915 Allahabad 6

TUDBALL, J.

Lachmin Narain and others—Plaintiffs—Appellants

v.

Kalka Prasad and another—Defendants—Respondents.

Second Appeal No. 1360 of 1913, decided on 23rd November 1914, from the de-

cision of the Addl. Sub-J., Mainpuri, dated 11th June 1913.

Agra Tenancy Act (2 of 1901), Ss. 20, 31 and 167—Suit for ejectment for illegal transfer lies in revenue court—But suit for declaration that transfer not binding is cognisable by Civil Court.

Where an occupancy tenant mortgages his holding and the mortgagee after obtaining a decree on foot of the mortgage forecloses it, the *zemindar* can sue for ejectment in a Revenue Court under S. 31 of the Agra Tenancy Act. But a suit for a declaration that such mortgage and decree were null and void and not binding on the landlord, would lie in the Civil Court.

[P. 7, C. 1 & P. 8, C. 1 & 2.]

A. P. Dube—for Appellants.

Gulzari Lal—for Respondents.

Judgment.—This is a second appeal in a suit which has arisen out of the following circumstances. In the year 1897 an occupancy tenant gave a mortgage, with conditional sale to a mortgagee, of one plot of land forming part of his occupancy tenure. That tenant is now represented by defendants Nos. 3 and 4 in the present suit. The mortgagee is represented by defendants Nos. 1 and 2. A foreclosure suit was brought against the tenant by the mortgagees, and it was decreed by the 13th April 1905. Final decree was obtained, was put into execution and the mortgagees-decree-holders obtained possession through the Civil Court on the 14th January 1912. To none of these proceedings was the plaintiff or his representative a party. The present suit was brought on November 15th, 1912, by the *zemindar* against the occupancy tenant and the mortgagees-decree-holders. The following reliefs were asked for : that it may be declared that all proceedings taken in regard to the mortgage, the decree and the obtaining of possession were null and void as against the plaintiffs and, *secondly*, that the occupancy tenants and their transferees be dispossessed and the plaintiffs put into possession. The suit was instituted in the Court of the Munsif who decreed it. On appeal the only point argued before the Court below was one of jurisdiction. The Court below treated the case in a peculiar manner. The point before it was only one of jurisdiction. It actually held that the suit was one under S. 31, clause 2, which is mentioned in group (c) of Schedule IV of the Tenancy Act of 1901 and as in that Schedule the period of limitation for such a suit is one year calculated from the date on which the

illegal transfer was made and as the suit has been brought more than twelve years from the date of the original mortgage, it was barred by limitation. The argument before me is that S. 31 of the Tenancy Act does not govern the present suit at all, that the Revenue Court has no power to declare a decree of the Civil Court to be null and void, that Section 31 does not cover or include those transfers which are declared to be illegal by Section 20, clause 2, or Section 21 and that the case is one which is cognisable by a Civil Court and is well within the period of twelve years. In the alternative I am asked to grant to the plaintiffs a declaration that the Civil Court decree and all proceedings taken thereunder are null and void as against the plaintiffs and not binding upon them, this being a declaration which the Revenue Court would have no authority to grant.

This is asked with a view to enable the plaintiffs to take further proceedings in the Revenue Court for ejectment of the opposite party. It seems to me that the suit as brought, in so far as the relief in ejectment is concerned, is clearly a suit contemplated by Section 31 of the Tenancy Act. At the time when the mortgage was made, *i. e.*, in the year 1897 the old Rent Act was in force, but even under that Act the transfer was illegal and could have been set aside. The present suit, if it had been brought before Act II of 1901 came into force, to obtain this relief, would have been brought in the Civil Court. But Act II of 1901 has clearly in view of Sections 20, 21, 31 and 167 removed a suit of this nature from the jurisdiction of the Civil Court and has placed it under the jurisdiction of the Revenue Court. The illegal transfers contemplated by Section 31 of the Tenancy Act clearly so include and cover the illegal transfers mentioned in Sections 20 and 21. Some stress is laid on the use of the word 'voidable' in Section 31. It conflicts, in one sense, with the meaning of Sections 20 and 21. But it seems to me that it is quite clear that the word 'voidable' is used in a wrong sense in Section 31. The object of that section is simply to state the methods in which a *zemindar* may avoid the result of a void transfer made by a tenant. It points out that the *zemindar* may sue for cancellation of the same, though it seems difficult to

understand why a void transfer should require cancellation; it also enables him to eject both the tenant and the transferee. Personally I have no doubt whatever that if an illegal transfer of any description whatsoever is made by a tenant at the present time, the landlord if he wishes to interfere in the matter must do so by a suit brought in the Revenue Court in terms of Section 31 of the Tenancy Act. It is clear, therefore, that the present suit in so far as it seeks the ejectment of the transferors and the transferees, is a suit which can only be brought in the Revenue Court and the Court of the Munsif had no jurisdiction whatsoever to deal with that portion of the case. In a suit of that description, moreover, an appeal does not lie to the Civil Court but to the Revenue Court (*vide* Schedule IV of the Act). Otherwise if the appeal had lain to the Civil Court, the question of jurisdiction would have fallen to the ground in the Court of appeal.

There remains the question of the declaration that the decree and possession thereunder are null and void and not binding on the plaintiffs. This, in my opinion, is correct. Section 20, clause 2, of the Tenancy Act clearly states that the interest of an occupancy tenant is not transferable in execution of a decree of the Civil Court. Also where the interest of the tenant is not transferable, Section 21 states that he shall not be competent to transfer his holding or any part thereof otherwise than by sub-lease as hereinafter provided. On behalf of the respondents it is urged that to grant to the plaintiffs this declaration will be of no use because, if they go to the Revenue Court now to seek ejectment they will be met by the bar of limitation. The plaintiff came into Court within twelve months of the delivery of possession by the Civil Court. It is quite possible that the Revenue Court may treat that delivery of possession as an illegal transfer in execution of a decree of the Civil Court and may possibly grant to the present appellants the whole of the period which has been occupied in the present litigation, on the ground that they have *bona fide* brought their suit in ejectment in a wrong Court. It is quite possible that the Revenue Court may, therefore, hold that there is no bar of limitation. It is not for me to lay down for the Revenue

Court what it ought or ought not to do. But in view of this possibility and in view also of the fact that the mortgage, the decree and delivery of possession were all contrary to law, I think I shall be justified in granting to the plaintiffs at least the declaration which they seek. It may possibly be of considerable use to them in the Revenue Court. The grant of the declaration is a matter of discretion. It was clearly asked for by the plaintiffs in their plaint. In the result the suit so far as it is a suit for ejectment, must fail on the ground that the Civil Court had no jurisdiction to entertain it. In so far as the suit is one for declaration, that the decree and proceedings taken in execution thereof are all contrary to law, null and void and not binding on the plaintiff, I think the suit should be decreed. I, therefore, allow the appeal to this extent that I grant to the plaintiffs the declaration that I have just set forth above. The rest of the claim stands dismissed. The parties will pay and receive costs in all Courts in proportion to failure and success. Costs in this Court will include fees on the higher scale.

Appeal partly allowed.

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KNOX, J.

Ram Chandra—Applicant

v.

Emperor—Opposite Party.

Criminal Reference No. 961 of 1914, decided on 11th December 1914, made by the S. J., Meerut.

Criminal P. C. (5 of 1898), Ss. 345 and 439—Compounding of offence in revision proceedings is not permissible though allowed in appeal.

Section 345 of the Criminal Procedure Code allows a case in which appeal is pending to be opened to composition with the leave of the Court before which the appeal is to be heard, but the section does not apply to cases coming up in revision. [P. 9, C. 1.]

Order of Reference.—On the 12th October, Umrao Singh was convicted by Mr. Sale, Joint Magistrate of Meerut, under Section 325 of the Indian Penal Code, in respect of grievous hurt caused to his mother, *Musammatt* Gomti. He has appealed and *Musammatt* Gomti has filed an application to be permitted to compromise the case, considering the comparative lightness of the injury which constituted grievous hurt and the relation of the

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* *Indicates Cases of Great Importance.*

* * *Indicate Cases of Very Great Importance.*

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A. I. R. 1915 Allahabad 10 (1)

RICHARDS, C. J. AND BANERJI, J.

Parmeshwar Dat—Plaintiff—Appellant

v.

Anardan Dat—Defendant—Respondent.

Second Appeal No. 1652 of 1913, decided on 26th November 1914, from the decision of the Dist. J., Cawnpore, dated 15th September 1913.

Benamidar—Right to sue—Benami mortgagee can sue in his name.

A person who is named in a mortgage-deed as mortgagee is entitled to sue upon the bond, even if he is a *benamidar*. 21 All 380, foll.

[P. 10, C. 1].

D. R. Sawhny—for Appellant.

Damodar Das—for Respondent.

Judgment.—This appeal arises out of a suit on foot of a mortgage, dated the 22nd of March 1900. Various pleas were taken, but the Court of first instance decided in favour of the plaintiff and granted a decree. On appeal the learned District Judge reversed the decree of the Court of first instance and dismissed the plaintiff's suit, on the sole ground that one Bhaiyalal was the real owner of the bond and that the plaintiff was merely a *benamidar* for him. It seems to us that the view of the District Judge was not correct. The alleged beneficial owner, Bhaiyalal, was actually produced as a witness for the plaintiff. He raised no objection whatever to the decree being made in favour of the plaintiff. The defendant never alleged that Bhaiyalal had made any claim, or raised any objection, to the amount of the bond being paid to the plaintiff. The plaintiff is the person named in the mortgage and was clearly entitled to sue even if he was the *benamidar*. This was held in the case of *Yad Ram v. Umrao Singh* (1). There cannot be the least doubt that the plaintiff could have given a perfectly valid discharge to the defendant if he had paid up the amount of the bond; and if the Court grants a decree to the plaintiff it is quite clear that Bhaiyalal could never sue again, even if we assume the finding of the lower Appellate Court to be correct that Bhaiyalal was in fact the real owner of the bond. We think that the view taken by the Court of first instance on this point, namely that the ques-

tion of the ownership of the bond did not arise under the circumstances of the present case, was correct. We accordingly allow the appeal, set aside the decree of the Court below and remand the case to the lower Appellate Court with directions to re-admit the appeal upon its original number on the file and to proceed to hear and determine the same according to law. The costs of both sides will be costs in the cause. The deficiency in the Court-fee in the lower Appellate Court of Rs. 5 due by the defendant must be made good before the appeal is heard. If that amount is not paid within a time to be fixed by the Court, the appeal to that Court by the defendant ought to be dismissed.

Appeal allowed.

A.I.R. 1915 Allahabad 10 (2)

CHAMIER AND PIGGOTT, JJ.

Municipal Committee of Ajmere—Defendant-Applicant

v.

Kifayatullah—Plaintiff-Opposite Party.

Civil Misc. Appln. No. 252 of 1914, decided on 19th January 1915, referred by the Comr., Ajmere-Merwara.

(a) *Ajmere Municipalities Regulation* (3 of 1877), S. 85—*Municipality not entitled to take any subsequent action after failing to take action under S. 85 (2) within one month of notice of re-erection of building.*

A person gave the Municipal Committee of Ajmere notice in writing of his intention to re-erect a certain building within the limits of the Municipality. No step was taken by the Municipality within one month of the notice under section 85 (2) of the Ajmere-Merwara Municipal Regulation.

Held, that the Committee had no authority to take any action subsequently under that section.

[P. 11, C. 2].

(b) *Ajmere Municipalities Regulation* (3 of 1877), S. 141—S. 141 does not bar suit for damages for tort by Municipality.

Section 141 of the Ajmere-Merwara Municipal Regulation does not bar a suit for damages in the Civil Court by a person wronged by an illegal action of the Municipal Committee. [P. 11, C. 2].

Sarat Chandra Choudhri—for Applicant.

Damodar Das—for Opposite Party.

Judgment.—This is a reference by the Commissioner of Ajmere-Merwara under section 18 of the Ajmere Courts Regulation, I of 1877. The facts stated in the reference are that one Kifayatullah on July 23rd, 1907, gave the Municipal Committee of Ajmere notice in writing of his intention

to re-erect a certain building within the limits of the Ajmere Municipality and with his application submitted a certain plan. On October 2nd, 1907, the Municipal Committee issued a notice to Kifayatullah to the effect that he had contravened the provisions of Section 85 of the Municipal Regulation by beginning to re-erect without permission, and required him to stop the work at once and submit an application for permission to build along with a plan. He was further told not to resume building until he received the orders of the Committee, for if the Committee found that the proposed building was objectionable it would have to be removed. On receipt of this notice Kifayatullah stopped the work. On March 10th, 1908, Kifayatullah brought a suit for recovery of Rs. 30 on account of damages, which he alleged he had suffered in consequence of the Municipal Committee having stopped the work and for a declaration that the notice was invalid. The Subordinate Judge gave the plaintiff a decree and his decree was affirmed on appeal by the Commissioner, but on an application made by the Municipal Committee under section 17 of the Ajmere Courts Regulation, the Commissioner has referred to this Court the question whether the suit was maintainable. The contention of the Municipal Committee appears to be that as it is invested by the Municipal Regulation, with a wide discretion in matters of this kind, no suit can be maintained in a Civil Court with regard to them. Section 85 of the Municipal Regulation lays down that every person intending to erect or re-erect any building shall, if required to do so by rules made by the Committee in this behalf, give notice in writing of his intention to the Committee and shall, if required to do so, submit a plan showing the level at which the foundation and the lowest floor are proposed to be laid and a specification of the works intended to be constructed and the materials to be used, and shall obey all written directions consistent with the Regulation given by the Committee within one month after receiving such notice, either prohibiting the erection or re-erection or in respect of a number of other matters detailed in the section. An attempt was made in the Court of the Commissioner to show that the notice given by Kifayatullah did not comply with the section. The Commis-

sioner declined to allow this point to be taken for the first time in appeal and we must assume that the notice given in this case complied with the requirements of the law. As we read Section 85, if the Municipal Committee wishes to prohibit the erection or the re-erection of a building or to give directions with respect to any of the matters detailed in the section it must issue its directions within one month after receiving the notice. In the present case the Municipal Committee allowed more than one month to elapse before communicating with Kifayatullah, and when it did communicate with him, it did not issue a notice as it might have done under sub-section (2) of the section requiring the building to be altered or demolished, but it required him to stop the work and submit a fresh application. If Kifayatullah gave a notice which did not comply with the law, it should have been regarded as no notice at all and the Municipal Committee could have required him to alter or demolish the building; but as it must be taken that the notice given was in compliance with the law and as the Municipal Committee did not issue any directions within one month of the receipt of the notice, the Municipal Committee had no authority to take any action under sub-section 2 of Section 85. It was suggested that Section 141 of the Act barred the jurisdiction of the Civil Court in cases of this kind. That section empowers the Commissioner or the District Magistrate to suspend the action taken by a Municipal Committee or to prohibit the doing of an act which is about to be done in pursuance of or under cover of the Regulation in certain cases. It seems to us doubtful whether Section 141 was intended to apply to such cases as this. Even if it can be construed so as to cover such cases, we cannot treat it as barring the jurisdiction of a Civil Court to entertain a suit for damages at the instance of a person who has been wronged by an illegal action of the Committee. In our opinion the suit was maintainable and this is our answer to the reference. Let the papers be returned.

Reference answered.

A. I. R. 1915 Allahabad 12

TUDBALL AND RAFIQUE, JJ.

Mt. Amina Bibi and others—Defendants—Appellants.

v.

Mt. Najmunissa Bibi—Plaintiff and others—Defendants—Respondents.

First Appeal No. 431 of 1912, decided on 1st February 1915, from the decision of the Offg. Sub-J., Gorakhpur, dated 24th August 1912.

Limitation Act (9 of 1908), Art. 62—*Muhammadan widow's suit for share of debt realised by her husband's other heirs in suit against debtors and herself is governed by Art. 62.*

M, a Muhammadan, died leaving his widow, N, and other heirs. The other heirs brought a suit on a mortgage in favour of the deceased making N a defendant. They obtained a decree and in its execution purchased the properties themselves:

Held, that the suit by N against those heirs who had recovered the mortgage-debt to realize her share of the debt was governed by Article 62 of the Limitation Act, as the suit was one for money received and had by the defendant for the plaintiff's use. 19 All. 169; 12 Mad. 487; 21 Cal. 157 P.O. and 32 Cal. 527 Ref. [P. 13, C. 2].

Abdul Raouf and Sunder Lal—for Appellants.

B. E. O'Connor and Iqbal Ahmel—for Respondents.

Judgment.—This and the connected Appeal No. 436 of 1912, arise out of one suit being cross-appeals from the same decree. The main facts are not in dispute and are as follows:—

Sheikh Minnat Ullah died leaving as his heirs his widow, the present plaintiff, and his father, Khadim Hussain. Under Muhammadan Law, the widow inherited a $\frac{1}{4}$ th share in his estate and the other $\frac{3}{4}$ ths went to the father. The latter died subsequently, leaving the present six defendants as his heirs.

Under a mortgage-deed, dated 14th February 1891, Nasrat Ullah and Musammat Karamat Bibi borrowed Rs. 7,296 from Minnat Ullah.

After the death of Khadim Hussain, the first defendant, Musammat Amina Bibi, his widow, obtained a succession certificate in regard to this debt due from the mortgagors.

Then she and the remaining defendants jointly sued to recover the mortgage debt, impleading the present plaintiff as a *pro forma* defendant, admitting that she was

entitled to a $\frac{1}{4}$ th share but alleging that she refused to join as plaintiff.

On 14th May 1903, they obtained a decree for the recovery of Rs. 17,168-8-0 *plus* future interest at 9 per cent. per annum from the date of suit upto the date of payment. In addition to this they were awarded their costs.

They put the decree into execution.

Thereupon the present plaintiff applied to the Court to be added to the proceeding as a decree-holder. To this the decree-holders naturally objected as she was not a decree-holder and stated that they would pay her $\frac{1}{4}$ th of the amount recovered after deducting the costs of the suit and execution proceedings.

Her application was disallowed on the 19th February 1904.

The mortgaged property was put to sale and sold for Rs. 23,590. The decree-holders obtained sanction to bid at the auction.

According to the statements in the plaint and the written statement in this suit, the property was purchased by the defendants Nos. 1 to 3, but it is stated before us that the property was knocked down to all the defendants and that then the other defendants withdrew, saying that the defendants Nos. 1 to 3 were the purchasers. This is of little consequence.

The amount of the debt itself due under the decree inclusive of interest upto the date of sale was Rs. 22,205-13, so that the purchase was for a sum of Rs. 1,384-13-0 in excess of this. The costs of the suit and execution proceedings amounted to a little less than 1,384-13-0. The purchasers applied under Order XXI, Rule 72 that the purchase-money and the amount due under the decree might be set off against each other and satisfaction of the decree entered up. This was allowed by the Court and they paid into Court the small amount which was due on their bid over and above the total amount of the decree.

The sale was confirmed on 15th July 1906. The present suit was brought by the plaintiff on 1st June 1912 against all the defendants.

She sued in the alternative for two reliefs. Primarily she sought to recover Rs. 8,562-3-6, being Rs. 5,551-7-4, her $\frac{1}{4}$ th share of Rs. 22,205-13-0, *plus* 3,010-12-2, interest from 21st May 1906,

the date of the auction-sale upto the date of suit.

The date on which the cause of action arose was given as 15th July 1906 the date of the confirmation of the sale.

Apparently in apprehension that the date on which the cause of action arose might be taken to be the date of the sale (21st May 1906), she alleged that the defendants Nos. 1 to 3 had been absent from India on a pilgrimage to Mecca from September 1911 to March 1912 (some six months) and that this period should be allowed to her for the purpose of calculating the period of limitation.

In the alternative she pleaded that if the first relief could not be granted, then she might be awarded possession of a $\frac{1}{4}$ th share in the property (valued at Rs. 5,897-8-0) and be granted mesne profits.

The defendants among other pleas urged.

(1) that the suit for a $\frac{1}{4}$ th share of the money was barred by limitation;

(2) that the plaintiff was not entitled to recover a share in the property purchased;

(3) that the defendants Nos. 4 to 6 were in any case not liable, as they had neither recovered the money nor purchased the property.

The Court below held

(1) that the money claim was not barred by limitation;

(2) that the defendants Nos. 4 to 6, not having received the plaintiff's share of the decretal money or purchased the property in lieu of the decretal money, were not liable to pay anything to the plaintiff.

It came to no decision in regard to the claim for a share in the property.

It gave the plaintiff a simple money decree, disallowing a part of the claim for interest.

The defendants Nos. 1 to 3 have appealed, and the point pressed is that the suit for money is barred by limitation as Article 62 applies.

The plaintiff has also appealed as against all the defendants, and the sole point she takes is that she is entitled to all the interest she claimed; she does not on her appeal claim that she is entitled to a decree for possession of the $\frac{1}{4}$ th share in the property.

We take first the question of limitation. The plea taken is that Article 62 of the Limitation Act applies, and not Article 120 as applied by the Court below, to the money claim.

In our opinion Article 62 clearly applies. The suit is clearly on the face of it one for money had and received by the defendants for the plaintiff's use. The Court below based its decision that Article 120 applied, on the authority of the ruling reported as *Umar Daraz Ali Khan v. Wilayat Ali Khan* (1). The headnote in the report is, we think, misleading.

In that case one heir of a Muhammadan recovered a debt due to her deceased husband. The other heirs sued to recover their shares thereof from the widow. In respect to this claim the Court of first instance applying Article 120 held that the suit was barred by limitation, it having been brought more than six years after the cause of action arose.

The plaintiff appealed and urged that Article 123 applied. This article governs a suit for a legacy or for a share of a residue bequeathed by a testator or for a distributive share of the property of an intestate and allows a period of twelve years.

A Bench of this Court repelled this. It held that Article 123 refers to a suit in which a plaintiff seeks to obtain his share from a person who, either as an executor or an administrator, represents the estate of a deceased person and is under a legal obligation to distribute shares to those entitled to them and that the suit before them was not one of such a nature. They quoted the ruling in *Sithamma v. Narayana* (2). They then observed: "In a recent case decided by their Lordships of the Privy Council, *Mahomed Riyasat Ali v. Hasin Banu* (3), which was a suit of a nature similar to the present, their Lordships refused to apply Article 123 and held the claim to be governed by Article 120."

Nowhere in the judgment did the Judges, who decided this case, say that Article 120 was the proper Article to apply, though perhaps this might be inferred to be their opinion from the passage

(1) [1897] 19 All. 169, (1897) A. W. N. 134.

(2) [1889] 12 Mad. 487.

(3) [1894] 21 Cal. 157; 20 I. A. 155 (P. C.)

quoted above. Article 62 was not mentioned in the judgment nor apparently was the question now before us discussed at the hearing. For the purpose of that appeal it was unnecessary to discuss or decide whether Article 62 or Article 120 applied. In either case the suit was barred by limitation as having been brought more than six years after time. *The only point decided was that Article 123 did not apply.*

In the case of *Mahomed Riasat Ali v. Hasin Banu* (3), the plaintiff sued to recover the estate of her deceased husband from the latter's brother, Riyasat Ali, who had taken possession of it. She based her title on a special custom. The estate consisted of both moveable and immovable properties. Their Lordships of the Privy Council held in regard to the cash and moveables wrongfully seized by the defendant, that neither Article 123 nor Article 49 applied but that Article 120 applied. In regard to Article 49 their Lordships remarked: "This latter Article does not appear to be applicable to a suit to establish a right to inherit the property of a deceased person." It is obvious that the present suit is not one to establish a right of inheritance.

The plaintiff's right to a $\frac{1}{4}$ th share in the money in suit has not at any time been disputed. On the contrary, it has always been openly admitted by the defendants who, in the execution proceedings, when they objected to the plaintiff being brought on the record as a decree-holder, stated that they would pay to the plaintiff her $\frac{1}{4}$ th share in the amount recovered from the judgment-debtor after deduction of costs.

When the amount of the decretal debt was set off in part against the amount of the defendants' bid at the auction, this was done as a matter of convenience and it was as if the defendants Nos. 1 to 3 had paid in the amount of their bid and had, then with defendants Nos. 4 to 6 recovered the amount due under the decree, and we have no hesitation, on the facts of the suit before us, in holding that Article 62 applies. The money was received by the defendants for the plaintiff's use. The decision in *Mahomed Wahib v. Mahomed Ameer* (4) supports us.

It is urged that Section 10 of the Limitation Act applies and that there is really

no period of limitation for such a suit as the present. It is clear, however, that Section 10 only applies to express trusts and not to circumstances such as those of the present suit.

It is also pleaded that if the money claim be held barred by time, then the Court ought to give the alternative relief, i. e., possession of a $\frac{1}{4}$ th share in the property. In the first place we must point out that though the plaintiff has appealed, she has not appealed on this point at all. In the next place we fail to see that she is equitably entitled to a $\frac{1}{4}$ th share in the property. She was not a co-decree-holder, nor did the defendants Nos. 1 to 3 put the decree into execution to recover only a sum of money in the whole of which the plaintiff had a $\frac{1}{4}$ th share. The money recoverable by the decree included the costs of the suit and execution proceeding. The property was purchased for a sum of money greater even than the full amount of the decree. Moreover, in equity the defendants were entitled to recoup to themselves the costs incurred in obtaining the succession certificate. Moreover, the amount due under the decree was set off only in part against the money due from the defendants-purchasers under their bid at auction. The purchase was made on behalf of only three of the decree-holders and not on behalf of all. We, therefore, hold that the plaintiff has no cause of action to recover a $\frac{1}{4}$ th share in the property.

The plaintiff was entitled to recover a $\frac{1}{4}$ th share in the decretal debt after deduction of all expenditure incurred legitimately by the defendants in recovering the debt. She waited for six years and nine days after the date of the sale before she sued, though her right had been admitted, and has only herself to blame for the result of her own delay.

The suit is barred by limitation. We allow the appeal and dismiss the suit with costs in both Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

A.I.R. 1915 Allahabad 15 (1)

RICHARDS, C.J., AND BANERJI, J.

Kalyan Singh—Plaintiff-Appellant

v.

Dammar Singh—Defendant-Respondent.

Second Appeal No. 1518 of 1913, decided on 24th November 1914, from the decision of the Addl. J., Aligarh, dated 16th June 1913.

Deed—Construction—Transfer hypothecating property with condition to pay interest and not to transfer till debt is paid is a mortgage and not charge—Transfer of Property Act (4 of 1882), Ss. 58 and 100.

Where by a deed of transfer the executant hypothecates his interest in the property and covenants to pay interest and also that he will not transfer the property so long as the debt remains unpaid, the deed constitutes a simple mortgage and not a charge. [P. 15, C. 1].

S. C. Banerji, B. K. Mukerjee and S. C. Chaudhri—for Appellant.

P. L. Banerji—for Respondent.

Judgment.—This appeal arises out of a suit brought on foot of a mortgage, dated the 14th of June 1889. A number of pleas were taken putting the plaintiff upon full proof. Both the Courts below have held that the mortgage was duly executed for good consideration. The Court of first instance decreed the plaintiff's claim. The lower Appellate Court reversed the decree of the Court of first instance, holding that the document did not amount to more than a charge and accordingly was barred by limitation, the suit not having been instituted until the year 1910.

In our opinion the decision of the lower Appellate Court was wrong. The mortgage is in form a simple mortgage, that is to say, the mortgagor states that he is hypothecating the interest he has and covenants to pay the interest, and that he will not transfer the property so long as the debt remains unpaid in whole or in part. This form of security has for many years been interpreted by this Court as a simple mortgage within the meaning of the Transfer of Property Act. It is admitted that if the property mortgaged had been ordinary *zemindari* rights the contention that it is not a simple mortgage would be unarguable. But it is said that the property which the mortgagor Muhammad Yusuf Ali had consisted of the rights of a usufructuary mortgagee jointly with certain other persons. In our opinion this can

make no difference whatever. The property which was mortgaged by Yusuf Ali Khan was his interest in the mortgagee rights and the plaintiff is entitled to have a sale of those rights for the purpose of realising the amount of the mortgage, provided the suit was instituted within time. The present suit was instituted within time, having regard to the provisions of Section 31 of the Limitation Act of 1908. We must allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts including in this Court fees on the higher scale. We extend the time for payment to six months from this date.

Appeal allowed.

A.I.R. 1915 Allahabad 15 (2)

PIGGOTT, J.

Raja Singh and others—Accused—Applicants

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1202 of 1914, decided on 28th January 1915, from an order of the S. J., Azamgarh.

Criminal P. C. (5 of 1898), S. 106—Sub-Divisional Magistrate holding second class powers can exercise powers under S. 106.

A Magistrate of the second class, who is also a Sub-Divisional Magistrate, can pass an order under Section 106 of the Code of Criminal Procedure binding over a person to keep the peace for a period exceeding six months.

[P. 15, C. 2 & P. 16, C. 1].

R. K. Sorabji—for Applicants.

R. Malcomson—for the Crown.

Judgment.—I must take it from the learned Sessions Judge, who had a better opportunity of satisfying himself on the point than this Court can have, that the trying Magistrate, Mr. A. G. Ausan, was a Sub-Divisional Magistrate in the District of Azamgarh at the time when this order was passed. The question raised by this application, therefore, is whether a Magistrate of the second class, who is also a Sub-Divisional Magistrate, can pass an order under Section 106 of the Code of Criminal Procedure binding over a person to keep the peace for a period exceeding six months. The suggestion is that, as such order carries with it an alternative sentence of imprisonment in case security

is not filed, the powers of a Magistrate of the second class, even though he may be a Sub-Divisional Magistrate, are limited as regards the period of imprisonment by the provisions of Section 32 of the Code of Criminal Procedure. I am clearly of opinion that the provisions of Section 106 of the Code of Criminal Procedure cannot be limited in this way. The powers therein referred to are conferred upon the Court of a Sub-Divisional Magistrate, and all that such Court does under that section is to require the person convicted to execute a bond with or without sureties for keeping the peace during such period, not exceeding three years, as the Court may think fit. If the period in question should exceed one year, the provisions of Section 123, clause (2), of the Code of Criminal Procedure necessitate a reference to the Sessions Judge but otherwise detention in prison, until the prescribed period expires or until within such period the required security is furnished, follows under the provisions of clause (1) of the same section, independently of the powers of the Magistrate. So long as the order requiring the applicant in this case to furnish security was passed by a Court which had authority to do so under the provisions of Section 106 of the Code of Criminal Procedure, and the period for which security was required did not exceed one year, the liability of the applicant to be detained in prison unless he furnished security is something independent of the powers of the Magistrate in the matter of passing substantive sentences of imprisonment. I dismiss this application.

Application dismissed.

A. I. R. 1915 Allahabad 16

CHAMIER AND PIGGOTT, JJ.

Roshan Lal and another—Defendants
—Appellants

v.

Mool Chand and others—Plaintiffs—
Respondents.

First Appeal No. 106 of 1914, decided on 25th November 1914, from the order of the Dist. J., Aligarh.

Specific Relief Act (1 of 1877), S. 42 and S. 52—Suit by mortgagor against usufructuary

mortgagee for injunction to enhance rent attributed to him or for declaration of being entitled to be credited with enhanced rent is not tenable unless mortgagee is persistently and without cause under-letting the shops—Mortgagor and mortgagee.

M usufructually mortgaged certain shops to R. The tenants of the shops paid Rs. 30-8 per mensem as rent, which the mortgagee had to realize in lieu of interest. The mortgage-deed provided that in the event of the tenants paying less amount, the mortgagor would make good the deficiency, and in the case of enhancement he would take the excess. The mortgagor served a notice on two of the tenants to vacate the shops in their occupation and to the mortgagee to compel them to do so, on the ground that there was a man who was willing to pay Rs. 4-12 in excess of what was being paid by them. Both the tenants and the mortgagee failed to comply with the requisition. The mortgagor then sued both the tenants and the mortgagee for (1) an injunction to direct the mortgagees to enhance the rent payable by the tenants to the extent of Rs. 4-12 per mensem and (2) a declaration that in the event of his failing to do so the mortgagor would be entitled to have the excess credited in reduction of the mortgage-debt :

Held, that the suit as brought was not maintainable as there was no allegation that over a specified period of time the mortgagee had persistently and without reasonable cause been letting the shops for less than their fair letting value. [P. 18, C. 1].

P. L. Banerji—for Appellants.

S. C. Banerji—for Respondents.

Judgment.—This is a first appeal from an order of remand passed under Order XLI, rule 23, of the Code of Civil Procedure. The suit was one by mortgagors against mortgagees, and for the determination of the question in issue before us it is necessary to consider carefully both the terms of the mortgage-deed and the frame of the suit. The mortgage was one of four shops, and in terms it purported to be a usufructuary mortgage in the 'full sense of the word, with delivery of possession. There were, however, some curious provisions, not wholly consistent with the ordinary status of a mortgagee in possession. Not only were the mortgagors liable for repairs, but there was a special stipulation with regard to the letting of the shops. The recital in the deed was that the four shops were let for a sum of Rs. 30-8 per mensem, and that the mortgagees were entitled to receive this as interest on their money. It is provided further that, in the event of the shops letting for less than this amount, the mortgagors are to make good the difference. Then comes a further provision that the right

to grant abatement of rent, or to enhance the rent, is reserved to the mortgagors, and that if the mortgagors can succeed in letting the shops so as to bring in a larger sum than Rs. 30-8 per mensem, the mortgagors are to receive the amount of such enhancement month by month.

The suit as brought was against two sets of defendants, the first set being the mortgagees and the second set being tenants occupying two of the shops. With regard to the other two shops not occupied by the defendants second party, nothing is said in the plaint. As regards these two particular shops, the plaintiffs allege that they are prepared to put in tenants who will pay a rent of Rs. 4-12 per mensem in excess of that at present being paid by the defendants second party. It is on that ground that the plaintiffs had served notices calling on the defendants second party to vacate the shops and on the defendants first party to compel them to do so; but both sets of defendants had refused to act on these notices. The relief sought is (1) an injunction to direct the defendants first party to enhance the rent payable by defendants second party to the extent of Rs. 4-12 per mensem; and (2) a declaration that, in the event of their failing to do this, the plaintiffs shall be entitled from the month of September 1911 to have the sum of Rs. 4-12 credited month by month in reduction of the mortgage-debt. The Court of first instance framed five issues, but decided only the first and the fifth. The learned Subordinate Judge was of opinion that the suit as brought was premature and not maintainable and he dismissed it accordingly. The District Judge on appeal has discussed the question solely from the point of view whether the suit could be said to be "premature," in the sense in which that expression had been used by the Court of first instance. The learned Subordinate Judge had expressed an opinion that all matters of account as between a mortgagor and his mortgagee could only be decided upon a suit for redemption of the mortgage, and he has given this as one of his reasons for holding that the suit was not maintainable. The learned District Judge has dissented from this view of the law and has accordingly set aside the decree of the first Court and remanded the case under Order XLI, Rule 23, of the Civil Procedure Code, recording his opinion

that the suit as brought is maintainable and not premature, though whether it can succeed or not is a point to be determined when the evidence has been taken and all issues in the case decided.

After hearing both parties, the conclusion we have come to is substantially this. The suit is not "premature" in the sense in which that expression was used by the Courts below; but we are, nevertheless, of opinion that the first Court was substantially right and that the suit is not maintainable as brought. In other words, we are of opinion that the facts stated in the plaint disclose a cause of action upon which the plaintiffs might have sought immediate relief, but their suit has been entirely misconceived and the reliefs sought by them could not possibly be granted. We have to deal with a mortgagee-deed containing peculiar and somewhat anomalous provisions. It is necessary for us to put some reasonable interpretation on the provision of that deed which reserves to the mortgagors the right of enhancing the rent. We think this provision was inserted in order to protect the interests of the mortgagors in the event of any considerable rise in the letting value of the property. We do not think that it was intended that the tenants in possession should be tenants of the mortgagors, or that the mortgagors should be entitled to eject them at pleasure. In fact the plaintiffs did not put forward any such claim in the present suit. Had they desired the Court to accept any such view as this, they would have asked for the ejectment of the defendants second party, as tenants who are refusing to vacate the premises after having been duly served with notice by the proprietors. What we do think the provision in question means is that the mortgagors are entitled, in the event of any definite appreciation in the letting value of the mortgaged property, to call upon the mortgagees to secure them the benefit of that appreciation. It is obvious to us, on the terms of the deed as it stands, that if the mortgagees had in fact succeeded in letting this property so as to bring in a monthly rental of Rs. 35-4, instead of Rs. 30-8, and had endeavoured to keep the difference of Rs. 4-12 monthly in their own pockets, upon a plea that this was a matter which could be decided only upon a suit for redemption, the mortgagors would be entitled to claim that the deed gave them a right to

the present benefit and enjoyment in respect of the enhancement of rent. They could have maintained a suit for recovery of arrears of enhanced rents from the hands of the mortgagees, and they could have maintained such a suit even during the pendency of the mortgage. From this it seems to us a reasonable inference to hold that, if the plaintiffs are in a position to prove that over a specified period of time the mortgagees have persistently and without reasonable cause been letting the shops for less than their fair letting value, the latter will be liable under the terms of the deed for not securing to the mortgagors the benefit of the enhanced rent. If this view is correct, it is obvious that neither the claim for an injunction nor the claim for a declaration can be maintained. The declaration in any case is an impossible one, because it is difficult to conceive of evidence which would justify a Court in holding that, from any given period upto such indefinite period as may be marked by redemption of the mortgage, the letting value of the shops is certain to be a specified sum in excess of that at present assessed.

The only other question which we have to consider is whether, if the order of remand be maintained and the suit sent back to the Court of first instance, the plaintiffs might not obtain some relief after asking for an amendment of the plaint. We have duly considered this point, and are of opinion that an amendment, such as would satisfy the view which we have taken as to the respective rights and liabilities of the parties, would so change the entire nature of the suit that it would not be proper for any such amendment to be permitted at this stage of the suit. On the fact stated by them the plaintiffs have a continuing cause of action, in this sense that they are entitled to claim damages for any period over which they can prove that these mortgagees are persistently and without reasonable cause under-letting the mortgaged property. The only penalty which they may have to pay for the failure of this suit would be their inability to recover damages for a comparatively short period between the month of September 1911 and the date of the institution of the present suit. We are, therefore, of opinion that the learned Subordinate Judge was

right in holding that this suit was not maintainable, inasmuch as it claimed reliefs not warranted by the facts upon which the cause of action was alleged to be based.

On this ground we accept this appeal, set aside the order of the lower Appellate Court and restore the decree of the Court of first instance. The defendants will get their costs throughout.

Appeal accepted.

A. I. R. 1915 Allahabad 18

CHAMIER AND PIGGOTT, JJ.

Sheo Harakh—Plaintiff—Appellant

v.

Ramchander — Defendant — Respondent.

Civil Revn. Appln. No. 84 of 1914, decided on 17th November 1914, from the order of Sub J., Mirzapur, dated 21st November 1913.

Bengal N.W.P. and Assam Civil Courts Act, (2 of 1887), Ss. 21 (4) & 22—Intention of cl. (4) of S. 21 is to dispense with order of transfer under S. 22.

Where appeals lying to a District Judge under sub-section 2 of Section 21 of the Bengal, N.W.P. and Assam Civil Courts Act are directed under sub-section (4) to be preferred to the Court of a Subordinate Judge, the intention is that the appeals preferred accordingly should be heard and disposed of by the Subordinate Judge without any order of transfer of such appeals to his Court under Section 22 of the Act. [P. 19, C. 1]

S. D. Sinha—for Appellant.

Uma Shanker Bajpai for *Nawal Kishore*—for Respondent.

Chamier, J.—This application for revision raises a curious question upon which, so far as we are aware, there has not been any decision of this Court. The plaintiff in this case filed a suit in the Court of the Munsif of Mirzapur, who in July 1913 decreed the claim. The defendant preferred an appeal against the Munsif's decree to the Court of the Subordinate Judge of Mirzapur. The Subordinate Judge proceeded to hear the appeal and in November 1913 allowed the appeal and dismissed the plaintiff's suit. This is an application for revision of the order of the Subordinate Judge, on the ground that the Subordinate Judge, in the absence of an order of the District Judge transferring the appeal to him for disposal, had no jurisdiction to hear it. Under Section 21 of the Bengal, N.W.P. and Assam Civil Courts Act appeals from decrees of Munsifs lie to the District Judge, but

under sub-section (4), of that section the High Court may, with the previous sanction of the Local Government, direct by notification in the Official Gazette that appeals lying to the District Judge, under Sub-Section (2) from all or any of the decrees or orders of any Munsif shall be preferred to the Court of such Subordinate Judge as may be mentioned in the notification, and the appeals shall thereupon be preferred accordingly. It appears that on April 25th, 1913, the High Court with the sanction of the Local Government directed by notification in the Official Gazette that appeals from the decrees of the Munsif of Mirzapur should be preferred to the Subordinate Judge of that district. On behalf of the applicant it is contended that that notification merely enabled the Subordinate Judge to receive such appeals, but did not give him any authority to hear them in the absence of an order under S. 22 of the same Act. S. 22 is the section which empowers a District Judge to transfer to any Subordinate Judge under his administrative control any appeals pending before him from decrees or orders of the Munsif. According to the argument presented on behalf of the applicant, an appeal which has been preferred under a notification issued under sub-section (4) of S. 21 of the Act is pending before the District Judge and, therefore, may be transferred by him to any Subordinate Judge under S. 22 of the Act. Speaking for myself I cannot accept this contention. It appears to me that after an appeal has been preferred to the Court of the Subordinate Judge it is pending in that Court, and I find much greater difficulty in holding that S. 22 enables the District Judge to transfer such an appeal as an appeal pending before himself than in holding that the Legislature intended that an appeal preferred to a Subordinate Judge under such notification should not be disposed of by him. An exactly similar question arose in Oudh in 1903. In the Oudh Civil Courts Act (XIII of 1879) there is a provision similar to S. 21, sub-section (4), of the Bengal, N. W. P. and Assam Civil Courts Act. Under S. 18, sub-section (3), of the Oudh Act, the Judicial Commissioner may, from time to time with the previous sanction of the Local Government, direct by notification in the Official Gazette that appeals from all or

any of the decrees or orders of any Munsif shall be preferred to such Subordinate Judge as may be mentioned in the notification, and the appeals shall thereupon be preferred accordingly. It will be noticed that there is a slight difference between the language of the Oudh section and the language of S. 21 of the Bengal, N. W. P. and Assam Civil Courts Act, and it has long been the practice in Oudh to insert in the notification under S. 18, sub-section (3), the name of the Subordinate Judge to whom the appeals are to be preferred. Whether this was necessary or not may be open to doubt, but the difference between the language of the two sections does not affect the question which we have to decide in this case. In the case of *Sohan Lal v. Baldeo Pershad* (1) the late Mr. Scott and I held that a Subordinate Judge, to whom appeals are preferred under a notification issued under S. 18, sub-section (3), of the Oudh Act, has jurisdiction to dispose of them. I am of the same opinion still. Hundreds if not thousands of appeals have been disposed of by Subordinate Judges in Oudh since the year 1879 upto the year 1903, on the assumption that they had jurisdiction to dispose of them and since 1903, on the strength of the ruling to which I have referred. I have no doubt that the appeal in the present case was rightly disposed of by the Subordinate Judge and I would dismiss this application with costs.

Piggott, J.—I concur both in the order proposed by my learned colleague and generally in the reasoning on which it is based. The only substantial argument in support of this application seems to be that there is nothing in S. 21 of the Bengal, N. W. P. and Assam Civil Courts Act which expressly lays it down that a Subordinate Judge, to whom an appeal has been preferred under sub-section 4 of that section, is to hear and to dispose of the same. To this it seems to me almost sufficient to reply that neither does the Act in question contain any provision that a District Judge, to whom an appeal from a decree or order of a Munsif lies under sub-section (2) of S. 21, shall proceed to hear and dispose of the same. I turn to the Code of Civil Procedure to ascertain what a Court has to do to which an appeal has been preferred,

and I find under Rule 9 of Order XLI that certain endorsements are to be made on the memorandum of appeal and the appeal is to be registered. Then power is conferred on the Appellate Court to dismiss the appeal, if it thinks proper to do so, without sending notice to the Court from whose decree the appeal was preferred and without serving notice on the respondent. After this follow the rules laying down the procedure to be followed when a day is fixed to hear the appeal and notice of the same is issued to the respondent. It is presumed throughout that the Court to which an appeal has been preferred shall do each and all of these things. The question before us in the present case, narrowed down to its ultimate limits, is, what should the Subordinate Judge of Mirzapur have done when this appeal was preferred to him? What he has actually done is to follow the procedure laid down in Order XLI of the Code of Civil Procedure and eventually to dispose of the appeal. The applicant's contention is that he should either have submitted the memorandum of appeal to the District Judge of Allahabad for an order of transfer, or have referred the matter to the said District Judge for the same purpose. There is certainly nothing in Act XII of 1887 which authorises a Subordinate Judge to do anything of this sort, and I concur without hesitation in the opinion expressed by my learned colleague that it would be a severe straining of the language used to say that this appeal, when it has been preferred to the Court of the Subordinate Judge of Mirzapur, was *ipso facto* pending before the District Judge of Allahabad. It seems to me altogether simpler to hold that the Legislature in drawing up the Civil Courts Act presumed that a Court to which an appeal was lawfully preferred would, in the absence of any order of transfer from a superior Court, proceed to hear and dispose of the same.

By the Court.—The application is dismissed with costs.

Application dismissed.

A. I. R. 1915 Allahabad 20

TUDBALL, J.

Richha and others—Appellants
v.

Emperor—Opposite Party.

Criminal Appeal No. 1105 of 1914, decided on 27th January 1915, from an order of the Asst. S. J., Meerut, dated 21st November 1914.

Criminal P. C. (5 of 1898), S. 408 (b)—Sentence for less than 4 years by Assistant Sessions Judge in a joint trial where higher sentences passed is appealable to High Court.

Where at a criminal trial held by an Assistant Sessions Judge some of the accused were sentenced to an imprisonment for more than four years and some for less than that period :

Held, that an appeal by the latter would also lie to the High Court under Section 408 (b) of the Criminal Procedure Code. [P. 20, C. 2].

Lalit Mohan Banerji—for the Crown.

Judgment.—The four appellants Richha, Daya Ram, Bhagwan and Shera have been convicted under Section 304 of the Indian Penal Code. The first three were sentenced to six years' rigorous imprisonment and a fine of Rs. 100 and the fourth to three years' rigorous imprisonment. They have all appealed to the Court. Though the appellant, Shera, has been sentenced to a term of less than four years and the Court which tried and decided the case was the Court of an Assistant Sessions Judge, it is clear that the case is one in which the appeal would lie to this Court in view of the language of Section 408, clause (b) of the Code of Criminal Procedure. This is clearly a case in which an Assistant Sessions Judge has passed a sentence of imprisonment for a term exceeding four years. As to the actual facts of the case there is clearly no doubt whatsoever. The deceased Bansi had a dispute with the appellants Richha, Bhagwana and Shera in respect of his house. It had fallen down and he was rebuilding it on certain land and they disputed his right on the ground that he had trespassed on their land. He brought a suit in the Civil Court which was decreed by the Court of first instance, but was dismissed on appeal. Directly the appeal had been allowed, the four appellants, with a labourer named Nehal, proceeded to Bansi's house and began to pull down his wall. He expostulated, whereupon Richha, Daya Ram and Bhagwana beat him with *lathis* and Shera, though an old man, joined in the assault. The son of Bansi appeared upon the scene and he too

was beaten. Bansi died because the injury to his chest—two of his ribs were broken—set up septic pneumonia which caused his death four days after. The medical evidence shows that he had received some twelve blows, that his arm as well as his two ribs was broken. No blows were inflicted upon his head. So that it is clear that the appellants did not intend to cause death and probably had no idea that the result of their assault would be death. The evidence in the case is very clear indeed. It was accepted by the Judge and Assessors unanimously as against these four appellants. I fully agree with their view of the evidence. The sentences imposed are meet and proper in view of the facts of the case. I, therefore, confirm the convictions and sentences and dismiss the appeals.

Appeal dismissed.

A. I. R. 1915 Allahabad 21 (1)

TUDBALL, J.

Kamta Singh and others—Plaintiffs—Appellants

v.

Parmeshwar and others—Defendants—Respondents.

Second Appeal No. 1651 of 1913, decided on 25th November 1914, from the decision of the Sub-Judge, Cawnpore, dated 5th September 1913.

Landlord and tenant—Grove-holder on *sir* land paying rent cannot be ejected by *zemindar* on loss of *zemindari*.

The plaintiff, *zemindar* of a village, permitted the defendant to plant grove on a *sir* plot on the payment of a nominal rent. Subsequently the plaintiff's *zemindari* right was sold but the grove existed as before :

Held, that the defendant grove-holder could not be ejected from the grove at the instance of the plaintiff. [P. 21, C. 1 & 2].

Hamilton—for Appellants.

Baldeo Ram—for Respondents.

Judgment.—This is a plaintiffs' appeal arising out of a suit in ejectment. The Court below has found the facts to be as follows : Sometime prior to the year 1887 the predecessor-in-title of the plaintiffs was the owner of certain *zemindari* plots, one of which was the grove land now in dispute. This was recorded as his *sir*, but with the sanction of this owner one Khushal Singh, uncle of Nathu Singh, planted a grove on the land and continued

to pay a rent of Rs. 3-8. In 1887 Nathu Singh sold the grove to the predecessor-in-title of the present defendants and left the village. From that date up to the present time the defendants continued to hold the land on payment of a nominal rent of Rs. 3-8. Trees still stand upon it and still constitute a grove. The plaintiffs in the meantime had lost their *zemindari* and the land no longer belongs to them, although it is possible (if it were *sir* that when they lost their *zemindari* they acquired an ex-proprietary tenant right. They now sue to eject the defendants. In these circumstances the Courts below have refused to give the plaintiffs a decree for the ejectment of the defendants. It is a well-known custom in these provinces that when the owner of land allows another to plant trees and make a grove thereon the condition of the tenancy is that the land shall be held by the grove-holder so long as the trees constitute a grove and that when the trees are removed or the grove ceases to exist the land reverts to the land-holder. It certainly would be most inequitable in the circumstances of the present case to eject the defendants and to hand over the trees which they have grown upon the land to the plaintiffs without the breaking of any condition and merely at the will of the plaintiffs. Whatever may have been the right of the latter it is quite clear that a grove-holder has a right to continue holding the land so long as he fulfils the conditions on which the land is given. In my opinion the decision of the Court below is perfectly correct. The appeal, therefore, fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 21 (2)

RAFIQUE, J.

Hardeo Prasad—Petitioner—Applicant v.

Ram Sarup—Opposite Party.

Civil Revn. Petn. No. 137 of 1914, decided on 8th January 1915, from the order of Dist J., Moradabad, dated 26th June 1914.

Criminal P.C. (5 of 1898), S. 195—Sanction necessary for prosecution under S. 467 of Indian Penal Code—Penal Code (45 of 1860), S. 467.

It is necessary for a party wishing to prosecute upon a charge of forgery committed in respect of a document produced in Court to obtain

sanction of the Court under Section 195 of the Criminal Procedure Code. [P. 22, C. 1].

Sital Prosad Ghose—for Applicant.

Simeon—for Opposite Party.

Judgment.—This is an application in revision challenging the order of the learned District Judge of Moradabad setting aside the sanction for prosecution granted by the Munsif. It appears that Ram Sarup, the opposite party, sued the applicant on the basis of a bond. The bond was denied and the claim of Ram Sarup was dismissed. On appeal the decree of the first Court was affirmed, and the Appellate Court said that Ram Sarup had obviously utilised an old stamp in fabricating the bond on behalf of the Applicant. The latter then filed an application in the Court of Munsif for the grant of sanction to prosecute Ram Sarup under Section 467, Indian Penal Code. The application was granted. On appeal the learned District Judge set aside the sanction, on the ground that the offence under Section 467, Indian Penal Code, was not included in Section 195 of the Code of Criminal Procedure. The learned Judge, it seems, overlooked the opening sentence of clause (c) of Section 195, Criminal Procedure Code. The sentence is "of any offence described in Section 463". Now an offence punishable under Section 467, Indian Penal Code, is defined in Section 463, Indian Penal Code. It is, therefore, necessary for a party wishing to prosecute upon a charge of forgery to obtain sanction under Section 195, Criminal Procedure Code. The order of the learned Judge is set aside and that of the Munsif is restored. Costs are allowed to the applicant.

Order of first Court restored.

A.I.R. 1915 Allahabad 22

TUDBALL AND RAFIQUE, JJ.

Muhammad Hamid Ali Khan—Plaintiff—Appellant

v.

Muhammad Asghar Ali Khan and others—Defendants—Respondents.

First Appeal No. 162 of 1912, decided on 5th March 1915, from the decision of the Sub-J., Bareilly, dated 19th February 1912.

Transfer of Property Act (4 of 1882), S. 130—Mortgagor can not question consideration of assignment by his mortgagee.

If the purchaser of a mortgagee right brings a suit on the basis of the mortgage, the mortga-

gor or his legal representatives or transferees cannot question the passing of the consideration for the sale between the mortgagee and his vendee the plaintiff. 18 All. 256, Ref.

The absence of any mention of necessity in the bond on which the loan is taken is no ground for holding that the transaction is fictitious. [P. 24, C. 2].

B. E. O'Connor and Tej Bahadur Sapru—for Appellant.

S. N. Sen—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant to enforce a mortgage said to have been given by Hakim Vilayat Ali Khan, a large landed proprietor of Aonla, to one Nazir Ali in 1895. The deed of mortgage purports to have been executed on August 30th, 1895, on behalf of Hakim Vilayat Ali Khan by Daud Ali under a special power-of-attorney. The plaintiff-appellant claims to have purchased the mortgagee rights of Nazir Ali by a sale-deed dated January 24th, 1900. Hakim Vilayat Ali Khan and Nazir Ali are both dead. The claim was brought against eight persons, the first two of whom are legal representatives of Hakim Vilayat Ali Khan, the third is the purchaser under a private sale-deed of a portion of the mortgaged property, the fourth, fifth and sixth are auction-purchasers of another portion, and the last two are the legal representatives of Nazir Ali. One of the latter died during the pendency of the suit and his heirs were brought on the record by an order dated February 25th, 1911. The first six defendants contested the suit on various grounds. They denied the genuineness of the mortgage of 1895 and the sale of 1900 as also the special authority of Daud Ali. They further pleaded that the mortgage in suit was effected by Daud Ali in collusion with Nazir Ali for no consideration without the knowledge of Hakim Vilayat Ali Khan, and that if it was executed by the latter, he executed it to defraud his creditor, Rai Durga Prasad, the ancestor of defendants Nos. 4 to 6. It was also alleged that no consideration passed on the mortgage in suit or on the sale-deed of January 24th, 1900. The learned Subordinate Judge of Bareilly in whose Court the suit was filed, while upholding the special authority of Daud Ali and the execution of the mortgage-deed of 1895 and the sale-deed of 1900, found that both were "bogus and paper transactions." He was of opinion that in the present case where the plain-

tiff was enforcing a mortgage against *bona fide* purchasers for value who denied its genuineness, it was for the plaintiff to prove in the first instance both the execution and the *bona fide* character of the deed; that the recital in the deed of 1895 as to the passing of consideration was no evidence against the purchasers who were third parties; that the indebtedness of Hakim Vilayat Ali Khan, the absence of any mention of the necessity for which the loan in suit was taken, the want of proof of passing of consideration on the deeds of 1895 and 1900 (the evidence on the point having been disbelieved), the doubtful means of Nazir Ali to advance a sum of Rs. 5,000 and the sale of the mortgage rights to a close relative of the mortgagor these were the reasons which made the learned Subordinate Judge hold that the transactions of 1895 and 1900 were fictitious. He accordingly dismissed the claim. The plaintiff has preferred this appeal. He contends that he has proved the genuineness of the mortgage in suit as also of the sale of 1900. In fact as to the latter he maintains that the question of the passing of consideration does not arise in the present case as between himself and the contesting defendants. The question of the character of the transactions of 1895 and 1900 depends upon the credibility of the evidence. To take up the mortgage in suit first. It was executed, as has already been remarked, by Daud Ali on behalf of Hakim Vilayat Ali Khan under a special power-of-attorney. Daud Ali has been examined and he deposes to the execution of the mortgage and the receipt of Rs. 5,000. One Nazir Husain deposes to the same effect. He swears that Rs. 5,000 were paid in his presence as consideration for the mortgage. There is nothing in the evidence of Daud Ali or Nazir Hussain to make us discredit it. The defendants-respondents would, however, ask us to reject the evidence of Daud Ali and Nazir Hussain for the reasons given by the learned Subordinate Judge. It is said (1) that if Hakim Vilayat Ali Khan executed the mortgage in suit he executed it with the object of defrauding his principal creditor, Rai Durga Prasad, and that is borne out by the heavy indebtedness of the Hakim; and that as a matter of fact the Hakim never executed the mortgage. Daud Ali in collusion with Nazir Ali, a man of

straw, fabricated the deed and practised a fraud on the Hakim. In support of the latter allegation the defendants-respondents examined three witnesses, namely, Sarup Narain, Ram Chander and Sheo Chand. The last two state that they saw a notice in the possession of Daud Ali from the Hakim calling upon the former to return the mortgage-deed of Nazir Ali. Ram Chander also says that he saw a draft of a plaint on behalf of the Hakim by which the cancellation of the mortgage-deed of Nazir Ali was sought. He admits that he saw the draft of the plaint in 1910 at the house of his master in the possession of one Wahid Ali Khan, a nephew of the Hakim, and the notice two years after in 1912. Daud Ali showed him the notice, because he, Daud Ali, wanted to sell himself and make money, as the production of the notice would have been a complete answer to the claim of the plaintiff. Ram Chander is a servant of the defendants-respondents Nos. 4 to 6, the sons of Rai Durga Prasad, and his evidence is not disinterested. Besides his evidence, even if credible, is not conclusive. He does not say that the drafts of the notice he saw bore the signature of the Hakim. If Daud Ali is a person of such a character as Ram Chander makes him out to be it is quite conceivable that Daud Ali showed a forged notice purporting it to be, from his former master in order to make some money from the defendants-respondents Nos. 4 to 6. But it is scarcely credible that Daud Ali would venture to play such a trick after having given evidence on oath almost two months before in support of the genuineness of the deed of 1895. He was examined as a witness for the plaintiff on November 17th, 1911, and according to Ram Chander the draft of the notice was shown to him on January 4th, 1912. Wahid Ali Khan who is said to have shown the draft of the plaint has not been examined on behalf of the defence. The other witness, Sheo Chand, is a man of no status. He was at one time in the service of Durga Prasad and on his own admission he is a mere acquaintance of Daud Ali. He also says that Daud Ali showed him the notice and a letter from the Hakim with the object of getting him, the witness, to persuade the defendants-respondents to buy them. The witness was promised 10 per cent. on the decree presumably in

favour of the defendants-respondents Nos. 4 to 6. The same remarks apply to the evidence of Sheo Chand as to that of Ram Chander. Sheo Chand deposes to a letter which he saw in possession of Daud Ali from the Hakim. The letter was to the effect that Daud Ali was to obtain a sale-deed of the mortgagee rights of Nazir Ali in favour of the plaintiff, because Durga Prasad had taken out execution of his decree. Now such letter, if genuine, would be inconsistent with the allegation of the fabrication of the mortgage in suit by Daud Ali. The witness does not say what date the letter bore or that it was signed by the Hakim. He says that he saw the letter three years ago, that is, some time in February 1909. It is not shown that any decree of Durga Prasad was in execution at that time. Besides it is difficult to see how the decree of Durga Prasad could be defeated by the assignment of the mortgagee rights of Nazir Ali to the plaintiff. The evidence of Ram Chander and Sheo Chand Rai is both inconclusive and unreliable. The evidence of Sarup Narain, Pleader, is much too vague to base on an inference that Daud Ali fabricated the deed of 1895. We, therefore, hold that the mortgage of 1895 was executed by Hakim Vilayat Ali Khan. The arguments advanced for the defence against its genuineness are also, in our opinion, of no force. The chief argument is the indebtedness of the Hakim at the time the mortgage was given. As there was no satisfactory evidence on the record about his financial condition, we remitted two issues to the lower Court for trial by which findings on the indebtedness of the Hakim and the value of his estate were called for.

The lower Court has now returned findings on the issues to the effect that the Hakim was indebted in 1895 to the extent of Rs. 89,000 including some doubtful debts, and that his estate at that time was worth Rs. 2,75,000. It has not been shown to us on behalf of the defence that the debts of the Hakim amounted to a larger sum than that found by the Court below. As to the valuation of his estate, even if the valuation arrived at by the lower Court be not accepted, that given by the defence would show that the Hakim was not in financial difficulties in 1895. According to the defence the value of the Hakim's estate in 1895 was Rs. 1,77,682.

It cannot be said that a man who has an estate of that value and is indebted to the extent of about Rs. 90,000 only creates a mortgage for Rs. 5,000 in order to defeat his creditors. The absence of any mention of the necessity for which the loan was taken is no ground for holding that the transaction was fictitious. A man of the position of the Hakim would not proclaim his private affairs by mentioning the need in the bond for raising the loan. The allegation that Nazir Ali was a man of no means has not been made out by the defence. It is true that four bonds have been produced on behalf of the defence which go to show that Nazir Ali with some other persons from March 1895 to December 1895 borrowed small sums. This evidence, if not explained would, no doubt, make it questionable whether Nazir Ali could advance such a large sum as Rs. 5,000 in 1895. But his brother, Ali Nahi, who has been examined in the case gives a satisfactory explanation of the said bonds. He says that his brother, who was Nazir in the Rampur State and through whom the salaries of the petty officials of the State used to be paid, used to stand surety for the said officials when they raised small loans. The creditors always asked him to stand surety as he could guarantee to them the re-payment of the loans by deducting from the salaries of the debtors the amount of the loans. The evidence of Daud Ali and Nazir Husain proves that consideration passed on the mortgage in suit and, as we have said before, we see no reason to reject their evidence. Besides the mortgage was put forward in 1908 in the life-time of the Hakim in execution of the decree against him by Durga Prasad and it was not denied by the Hakim. We hold that the mortgage in suit was genuine and for consideration.

As to the sale-deed of 1900 its execution is not disputed. The objection is that no consideration passed on it. Mumtaz Hussain, a marginal witness to the sale-deed in question, has been examined for the plaintiff and deposes to the passing of consideration. He has not been believed by the lower Court, because in its opinion the sale of 1900 was a part of the fraud that originated with Daud Ali in 1895. The lower Court considered the evidence of Mumtaz Hussain not on its own merits, but in the light of the circumstances which in its opinion showed the mortgage tran-

section of 1895 to be fraudulent. As it has been shown that the said circumstances do not exist and do not prove the transaction of 1895 to be fictitious, the objection to the evidence of Mumtaz Hussain disappears. We see no reason to discredit his evidence and find it proved that consideration passed on the sale of 1900. Besides the failure of consideration on the sale in question would not defeat the claim of the plaintiff. The question of consideration on the sale is one that concerns the vendor of the plaintiff and his representatives have not denied the receipt of consideration. The defendants-respondents cannot raise the question in the present case, *vide Ahmad-ud-din Khan v. Sikandar Begam* (1).

We, therefore, allow the appeal, reverse the decree of the lower Court and decree the claim of the plaintiff for the amount claimed up to the date of suit, with costs in both Courts including in this Court fees on the higher scale. In default the property will be sold. The usual decree under Order XXXIV, Rule 4, will be prepared. We allow six months from this date for the payment of the money. Interest at the contractual rate is allowed up to the date of payment. Considering the great delay in bringing the suit we allow no interest after the date fixed for payment.

Appeal allowed.

(1) [1896] 18 All. 256 = 1896 A.W.N. 52.

A.I.R 1915 Allahabad 25

RICHARDS, C. J., AND BANERJI, J.

Niamat Ali—Defendant-Appellant

v.

Ali Raza and others—Plaintiffs-Respondents.

First Appeal No. 131 of 1913, decided on 20th November 1914, from the decision of the Dist. J., Farrukhabad, dated 19th February 1913.

Civil P. C. (5 of 1908), S. 92—*Dispute about Mutwalliship on ground of relationship does not come under S. 92.*

Suits relating to disputes between parties as to who is entitled to be *mutwalli* on the ground of family relationship are not brought under Section 92 of the Civil Procedure Code.

[P. 26, C. 1].

*Tej Bahadur Sapru and A. Haidar—*for Appellant.

*Abdul Raoof and Gulzari Lal—*for Respondents.

1915—A. 4

Judgment.—In this suit, which purports to have been brought under the provisions of Section 92 of the Code of Civil Procedure, the plaintiffs claimed that the defendant should be removed from the *mutwalliship* of certain property, which was specified in lists A and B appended to the plaint, that the defendant should be called upon to furnish accounts and that a new trustee or trustees from the family of the original appropriator (one Wali Ullah) should be appointed. In the plaint are set forth the history of the *wagf*, about which there appears to be no doubt. One Maulvi Wali Ullah started an Arabic school of literature and Muhammadan jurisprudence in the city of Farrukhabad about the year 1808. He dedicated certain shops, which at present produce about Rs. 22 per mensem, for the expenses. For a long time a man of the name of Syed Fazl Ali was *de facto mutwalli*. He made a further *wagf* of property worth about Rs. 7,500. He continued to be at least *de facto mutwalli* during the remainder of his life and named his son, Inam Ali, to be *mutwalli* after his death. Inam Ali succeeded Fazl Ali and died on the 5th of February 1908. Fazl Ali, when making his dedication, provided that the descendants of Inam Ali should be the *mutwallis* of the entire endowment. After the death of Syed Inam Ali, who apparently died without issue, his brother Karamat Ali assumed the *mutwalliship*. Then followed some litigation, Karamat Ali brought a suit asking for a declaration that he was the lawful *mutwalli* of all the property. The Court of first instance decided in his favour. The principal plaintiff in the present suit, Syed Ali Raza was a party. Syed Ali Raza appealed and on the case coming before this Court the suit was withdrawn with liberty to bring a fresh suit. From the judgment it would seem that the Court had indicated that the evidence adduced by Karamat Ali was not sufficient to justify it in making an affirmative declaration in his favour. No fresh suit was apparently brought owing to the death of Karamat Ali. On the death of Karamat Ali, which took place on the 23rd of August 1911, the present defendant, Niamat Ali became *mutwalli* under the guardianship of his mother, Musammatt Tasliman. This was in accordance with a provision in the Will of Karamat Ali. The present suit was then

instituted on the 20th of February 1912. It must be noted here that there is no allegation in the plaint that there has been any misappropriation of trust funds or any breach of trust. It is not alleged that any scheme was required. The prayer is simply for the removal of the defendant from the office of *mutwalli* and that some new trustee or trustees from the family of the original appropriator should be appointed.

The Court below has made a decree removing the defendant from being trustee and has appointed the plaintiff, Syed Ali Raza, *mutwalli*. It has even given the costs of the suit against the defendant. Section 92 of the Code of Civil Procedure provides for a suit for certain reliefs in the Court of the District Judge in a case of an alleged "breach" of a trust created for public purposes of a charitable or religious nature or where the direction of the Court is deemed necessary for the administration of any such trust. Suits relating to disputes between parties as to who is entitled to be *mutwalli* on the ground of family relationship are not brought under this section. We have already pointed out that no breach of trust was alleged nor proved, nor was it shown in any way that the intervention of the Court was necessary. Assuming that Karamat Ali was legally entitled to be the *mutwalli*, an office which he undoubtedly *de facto* enjoyed, he was entitled to appoint his successor. It seems to us that the suit was entirely misconceived and ought not to have been entertained by the learned Judge. It is argued that there was no *mutwalli* and that the *waqf* property was derelict, and that accordingly the intervention of the Court was absolutely necessary. This is clearly not so. Karamat Ali was *de facto mutwalli*, and it was never decided that he was not also *de jure* so. As a matter of fact it clearly appears that the defendant did assume the office and apparently the trust property was being properly managed. It is said that the defendant Niamat Ali is a minor. It is possible that he was a minor according to the Indian Majority Act, but it is by no means certain that he was a minor according to the Muhammadan Law, that is to say, that he had not reached the years of puberty and discretion. In the Will of Karamat Ali, which was made before the present dispute arose, he is described as being a boy of 16 years of age. On the

general merits of the case it seems to us that the present suit has very little. The defendant is the grandson of Fazl Ali, who made the last endowment the most substantial portion of the *waqf*. Fazl Ali had for many years been at least *de facto mutwalli* of the endowment created by Wali Ullah, and the presumption would be that he was also *de jure mutwalli*. According to the spirit of Muhammadan Law Niamat Ali, his grandson, would have the best right to be *mutwalli*. We need hardly say that if there is a breach of trust in the future, it will be open upon proper proof to get the *mutwalli* removed and a new trustee appointed.

We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts.

Appeal Allowed.

A. I. R. 1915 Allahabad 26

TUDBALL, J.

Mt. Niadri—Defendant-Appellant

v.

Kura and others—Plaintiffs-Respondents.

Second Appeal No. 615 of 1913, decided on 4th December 1914, from the decision of the Addl. J., Meerut, dated 19th April 1913.

Hindu Law—Custom—Daughter not excluded from inheritance among Balayan Jats.

There is no custom excluding a daughter from inheritance among *Balayan Jats* in Meerut Division. [P. 27, C. 2].

Tej Bahadur Sapru and Durga Charan Banerjee—for Appellant.

Sital Prasad Ghosh—for Respondents.

Judgment.—This appeal arises out of a suit for possession of the estate of one Sher Singh, *Jat*.

The plaintiffs-respondents are the nearest male agnates of Sher Singh. The defendant is the daughter of Sher Singh. The plaintiffs pleaded a special custom in their family, village, the neighbourhood and the caste, under which a daughter is excluded from inheritance.

The Court of first instance, on the evidence, held that the custom alleged had not been established.

The lower Appellate Court held that the evidence was sufficient to prove the existence of the custom.

The only point before me is whether taking the evidence as accepted by the Court below, it is sufficient in law to establish an immemorial, invariable custom.

There is no plea that the parties are not Hindus. The custom alleged is one at variance with the ordinary rule of Hindu Law and is both harsh and unnatural, and it lay on the plaintiffs to prove it by clear and cogent evidence.

The parties are *Balayan Jats* and the story is that this class of *Jats* inhabit 84 villages in the Meerut Division, that they came from Malanai in the Delhi District and are, therefore, *Punjabi Jats* as having come from the Punjab.

The plaintiffs called in evidence some 18 witnesses who mentioned 36 instances (some five or six from this very village) of the custom having been followed. These were not supported by any documentary evidence relating to these instances.

Fifteen *Wajib-ul-araz* were produced. In only one of these was the daughter expressly excluded in terms, though the inference to be drawn from the others is that the daughter was to be excluded.

Some six judgments were quoted in cases in which the custom was upheld, one at least being connected with this very village.

On the other hand the defendant also called witnesses who quoted 24 instances (some 4 or 5 from this very village) in which the daughter had inherited her father's estate, one being in the very family of the parties. *Khewats* were produced in support of this oral evidence to show that the instances were genuine, and not imaginary.

Several judgments have also been quoted in cases in which it was held that the custom did not exist, the latest being that in First Appeal No. 173 of 1912 [*Mt. Bhagwani v. Khushi Ram* (1), to which I myself was a party] decided on 16th June 1914.

In regard to the claim that the plaintiffs are *Punjabi Jats* (among whom the custom prevails) in that they came from the Delhi Division, I need only point out that prior to the Mutiny Record of 1857 the Delhi Division had never at any time formed part of the Punjab. Till then under the British Rule it was part of these Provinces and as far as can be discovered from historical records, it was not at any time included in the Punjab. What is now called the Punjab Province includes a considerable area outside the Punjab

proper. *Jats* who lived in the Delhi District prior to the Mutiny were not and could not have been *Punjabi Jats* at that time. The *Balayan Jats* settled in the Meerut Division long prior to the Mutiny. The claim to be called *Punjabi Jats* has no real basis in history. The lower Court started with a presumption that being *Punjabi Jats*, the *Balayan Jats* brought with them their own customs from the Punjab, but they came not from the Punjab. Taking the evidence accepted by the lower Court the case is

(1) that 36 instances one way and 24 the other way have been established;

(2) that there are decisions in cases both ways:

(3) that 15 *Wajib-ul-araz* of the year 1863 contain entries which support the plaintiffs and at least go to show that even if there was no universal custom, at least there was a strong feeling among the *Jats* of this Province, in the 15 villages, that daughters should not be allowed to inherit.

But it must be proved that the custom is at least both immemorial and invariable before the Courts can uphold it, as it is a variance with the rule of Hindu Law. It is impossible to say in the state of the evidence that either of these two necessary qualifications has been proved, when we find that in so large a proportion of instances the daughters have actually inherited within the memory of man.

The evidence taken, as it stands, is clearly insufficient to establish this custom.

I allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance. The appellant will have her costs in both this and the lower Appellate Court, including in the Court-fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 27

CHAMBER AND PIGGOTT, JJ.

Man Singh—Decree-holder—Appellant
v.

Amantaka Prasad—Judgment-debtor—Respondent.

First Appeal No. 254 of 1914, decided on 15th December 1914, from the decision of the 2nd Addl. Sub-J., Aligarh dated 18th April 1914.

Transfer of Property Act (4 of 1882), S. 52—Auction-purchase in the interval of preliminary and final mortgage decree is pendente lite.

The purchaser of a property in execution of a simple money decree between the date of passing a preliminary decree for sale under O. XXXIV, R. 4, and a final decree under R. 5 of the Order in respect of the same property, is a purchaser *pendente lite* and is liable to the provisions of S. 52 of the Transfer of Property Act, and his purchase cannot in any way affect the rights obtained by the decree-holder under the preliminary decree. [P. 28, C. 2,]

Gulzari Lal—for Appellant.

Satish Chandra Banerji—for Respondent.

Facts.—Kunwar Man Singh, the decree-holder, obtained a preliminary decree for sale under O. XXXIV, R. 4, Civil Procedure Code, on 31st of May 1913, against Jaikishore. Out of the many properties involved in the decree, one was sold in execution of a simple money-decree on 21st July 1913 and was purchased by the respondent, Amantaka Prasad. The final decree for sale under O. XXXIV, R. 5, Civil Procedure Code, was passed on 6th January 1914. The decree-holder applied for execution of the decree against Anantha Prasad as well and sought relief against him too. Amantaka Prasad objected to the execution of the decree, contending that he was wrongly impleaded in the execution proceedings and that his purchase was binding on the decree-holder. The lower Court allowed his objection and ordered his name to be struck off from the application.

The decree-holder appealed to the High Court.

Judgment.—This is a first appeal by a decree-holder in an execution case. A preliminary decree for sale under O. XXXIV, R. 4, Civil Procedure Code, was obtained on the 31st of May 1913 against one Jai Kishore. Several properties were involved in this decree. One of these properties was put up for sale on the 21st July 1913 in execution of a simple money decree and was purchased by the respondent, Amantaka Prasad. The final decree for sale under Order XXXIV, Rule 5, Civil Procedure Code, was passed on the 6th of January 1914. In applying for execution of this decree the decree-holder named Amantaka Prasad as one of the persons against whom relief was sought and notice was issued to Amantaka Prasad accordingly. The latter appeared in Court, presenting a petition of objections, in the course

of which he did not content himself with alleging that he had been wrongly impleaded in the execution proceedings but claimed further that, by reason of certain events, his purchase was in some way or other binding on the decree-holder, so that the property purchased by him ought not to have been put up for sale. In dealing with this matter the Court below has contented itself with saying that the decree-holder might have impleaded Amantaka Prasad in the interval between the preliminary decree for sale and the decree absolute. As he has not done so, he was not justified in trying to bring Amantaka Prasad on the record as the legal representative of the judgment-debtor in subsequent execution proceedings. The formal order which followed was to the effect that Amantaka Prasad's objection is allowed, and his name be struck off the application for execution and the execution proceedings. As it stands, this order appears to be one that the property in *Mouza Yahapur* involved in Amantaka Prasad's objection should not be put up for sale in execution of the decree. If this be the effect of the order, it seems to us that it was clearly wrong; but we are informed that it has not been interpreted in this sense and the property has actually been sold. Whether this be so or not, we think it advisable to amend the formal order lest it should give rise to difficulty hereafter. In our view Amantaka Prasad was a purchaser *pendente lite* pure and simple. He was liable to the provisions of Section 52 of the Transfer of Property Act (IV of 1882) and his purchase could not in any way affect the rights obtained by the present appellant under the preliminary decree for sale. A case in many respects similar to the present, though somewhat stronger, decided by their Lordships of the Privy Council, is that of *Faiyaz Husain Khan v. Prag Narain* (1). If the appellant now before us has made any mistake, it has been in seeking to implead Amantaka Prasad at all in the execution proceedings. He does not admit that Amantaka Prasad acquired any title under his auction-purchase, and consequently should not have attempted to treat him as the legal representative of the judgment-debtor. If Amantaka Prasad

(1) (1907) 29 All. 339=34 I.A. 102=10 O.C. 814 (P.C.)

has chosen of his own accord to come into Court, as a person in possession of property which was in danger of being sold in execution of a decree, and asked the Court to adjudicate on the matter, he might have been entitled to a hearing. As the case stands, we think that that portion of the lower Court's order which simply directed the name of the appellant to be struck off the file of the execution proceedings was correct. We so far allow the appeal that we amend the formal order of the Court by directing that the first few words of that order shall run thus, namely, "that the objections be so far allowed that the name of Amantaka Prasad be struck off, et cetera, et cetera." In other respects the appeal is dismissed. We leave the parties in this Court to pay their own costs.

Appeal partly allowed.

A. I. R. 1915 Allahabad 29 (1)

TUDBALL, J.

Chet Ram—Plaintiff—Appellant
v.

Sahaba and others—Defendants—Respondents.

Civil Revn. No. 153 of 1913, decided on 8th January 1915, from the decree of the Sm. C. Court J., Bulandshahr, dated 22nd Sept. 1913.

Agra Tenancy Act (2 of 1901), S. 79 (1) (b)—Suit under S. 79 (1) (b) for damages for crops on wrongful dispossession lies in revenue court.

Section 79 (1) (b) of the Agra Tenancy Act entitles a plaintiff to recover the value of any crop which has been wrongfully removed by the defendant as one of the resultant damages of wrongful dispossession. [P. 29, C. 2.]

Therefore, a suit for compensation for the value of the crops which were wrongfully removed is a suit for compensation for illegal ejectment by a tenant against his landlord and should be brought in a Revenue Court. [P. 29, C. 2.]

Girdhari Lal Agarwala—for Appellant.

Judgment.—The plaintiff is a person who obtained a sub-lease from the defendants, the occupancy-tenants of the land. He sowed the land. The lessors trespassed on it and cut and removed his crops. He prosecuted them in the criminal Court charging them with criminal trespass and assault. One of them, Laljit, was convicted of these two offences and was fined Rs. 10. The plaintiff now brings a suit for compensation for the value of the

crops which were removed. The lower Court, that is, the Judge of the Court of Small Causes, has rejected the plaint, on the ground that the suit was one for compensation for illegal ejectment by a tenant against his landlord, and has returned it for presentation to the proper Court. The plaintiff applies in revision and contends that the suit is merely to recover the value of the property which was illegally taken by the defendants. It is clear that after the wrongful ejectment, the plaintiff was entitled to bring a suit to recover possession of the holding and also for compensation for wrongful dispossession under Section 79 of the Tenancy Act. If compensation for wrongful dispossession could cover and include the value of the crops removed by the defendants, then it is clear that the suit ought to have been brought in the Revenue Court and not in the Court of Small Causes. It seems to me that clause (1) (b) of Section 79 would entitle the plaintiff to recover the value of any crop which has been removed by the defendants as one of the resultant damages of wrongful dispossession. The suit, therefore, ought to have been brought in the Revenue Court and the order of the Court below is quite correct. This application is, therefore, rejected. I make no order as to costs, as the opposite party is unrepresented.

Petition dismissed.

A. I. R. 1915 Allahabad 29 (2)

CHAMIER AND PIGGOTT, JJ.

Collector of Benares and another—
Plaintiffs—Appellants
v.

Shiam Das and others—Defendants—
Respondents.

First Appeal No. 90 of 1914, decided on 8th February 1915, from an order of the Sub-J., Jaunpur, dated 2nd March 1914.

Agra Tenancy Act (2 of 1901), S. 79—Constructive possession is no possession for purposes of S. 79.

A person who has been constructively in possession of a holding may be regarded as having been ejected within the meaning of Section 79 of the Tenancy Act and, therefore, must sue under that section if he wishes to recover possession of the holding. [P. 30, C. 1.]

Ryves—for Appellants.

B. E. O'Connor and Gokul Prasad—
for Respondents.

Judgment.—This is an appeal against an order of the Subordinate Judge of Jaunpur, directing that the plaint be returned to the plaintiff for presentation to the proper Court. The Subordinate Judge was of opinion that the suit as brought was cognizable only by the Revenue Court. The only facts which need to be stated for our present purpose are that in 1869 the ancestors of some of the defendants made a simple mortgage of the property in favour of the ancestor of Rai Sheo Prasad and Rai Shambhu Prasad, who are represented in the present case by the Collector of Benares as Manager of the Court of Wards. A decree *nisi* for sale was obtained on the mortgage in February 1901. An order absolute for sale was passed in April 1904. The property was put up for sale in March 1907, when it was purchased by Sheo Prasad and Shambhu Prasad, and the sale was confirmed in May 1907. In the plaint it is stated that the plaintiffs endeavoured to obtain possession of the property in October 1907 but were resisted by the defendants. The cause of action is said to have arisen on October 3rd, 1907. The original mortgagors of the property were fixed-rate tenants. The principal defendants to the suit are the *zemindars* of the land. On March 21st, 1904, they obtained a decree for arrears of rent against the fixed-rate tenants and on May 14th, 1904, they obtained an order for their ejection and in due course ejected them and took possession of the land. The plaintiffs in the present case claimed to have acquired the rights of the fixed-rate tenants and so to have become themselves fixed-rate tenants of the land. The Subordinate Judge was of opinion that this was a suit by tenants, who had been ejected otherwise than in accordance with the provisions of the Tenancy Act, against their land-holders for recovery of possession of a holding within the meaning of Section 79 of the Tenancy Act. From the facts stated above it appears that the plaintiffs have never in fact held possession of the land in suit. It has been held by this Court in several cases that a person who has been constructively in possession of a holding may be regarded as having been ejected within the meaning of Section 79 of the Tenancy Act and, therefore, must sue under that section, if he wishes to recover possession of the holding. We need not review the rulings cited to us,

for it seems to us quite clear that in the present case it is impossible to hold that the plaintiffs have ever been even in constructive possession of the holding. The persons whose rights they claim to have acquired were ejected by the landlords in May 1904. The plaintiffs did not purchase the property till March 1907 and they do not profess to have gone anywhere near the property till October 1907. As the plaintiffs do not assert that they have ever actually held possession of the land and it is impossible to hold that they have ever been even constructively in possession of the land, we cannot hold that they have been ejected within the meaning of S. 79. We express no opinion whatever on the merits of the case, but we are of opinion that the suit was maintainable in the Civil Court and that the order of the Subordinate Judge cannot be maintained. We allow this appeal, set aside the order of the Subordinate Judge and remand the case to the Subordinate Judge for trial according to law. Costs here and hitherto will be costs in the cause and will include in this Court fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 30

CHAMIER AND PIGGOTT, JJ.

Ahmad Raza Khan—Plaintiff—Appellant

v.

Ram Lal and another—Defendants—Respondents.

Second Appeal No. 1514 of 1913, decided on 16th December 1914, from the decision of the 2nd Addl. J., Aligarh, dated 11th June 1913.

Adverse possession by co-owner—Burden lies on him to prove adverse possession.

There is a presumption that the possession of one co-owner is the possession of the other, and the burden lies on the co-owner setting up title by adverse possession to prove that he or his predecessor had set up an adverse title to the other co-owner's share, to the knowledge of the latter, more than twelve years before the institution of the suit. [P. 32, C. 1.]

Corea v. Appuhamy, (1912) A. C. 230 foll and case law Ref.

S. K. Dar—for Appellant.

D. C. Banerji and Lachmi Narain—for Respondents.

Judgment.—This was a suit for possession, by partition, of a half share in a small property, described as *Ihata Nidhan Singh*, in the city of Kail, and consisting appar-

ently of some waste land and the sites of a few houses.

The property belonged formerly to two brothers, Nihal Singh and Bhawani Singh. The rights of the former passed to his three grandsons who in May 1909, alleging that they were owners of the whole property, sold the whole to the appellant. The appellant admits, however, that by his purchase he acquired only a half share in the property. The rights of Bhawani Singh in the other half passed to his son, Mathura Prasad, and later in execution of a decree against Mathura Prasad were sold to two persons who in August 1909 transferred them to the respondents.

The appellant's case is that he was in possession of his half share till March 1911 when the respondents denied his title. The defence was that the appellant or the persons through whom he claims have not been in possession of the share within twelve years of this suit, and that the respondents have been in adverse possession of the same for more than that period.

The Munsif found that as the appellant had failed to prove possession within twelve years the suit failed, although the respondents had failed to prove adverse possession by them for more than a very short time. On appeal the Additional District Judge agreed with the Munsif that the appellant had failed to prove possession within limitation, and, therefore, held that the suit had been rightly dismissed. He went on to hold that as the possession of one of two co-owners could not be regarded as the possession of the other co-owner, the possession of the respondents must be held to have been adverse to the appellant.

In second appeal the learned Vakil for the appellant did not dispute the correctness of the rule laid down in *Jafar Husain v. Mashuq Ali* (1), that where a suit for possession of immoveable property is resisted by a plea of adverse possession for more than twelve years, the question of limitation becomes a question of title, and it lies upon the plaintiff in the first instance to give satisfactory *prima facie* evidence of possession within twelve years of the suit; but he contended that as the appellant and the respondents are, as their predecessors were, co-owners, or as English lawyers would say tenants-in-common, of the property, the possession of the respon-

dents was in law that of their co-owner, the appellant, and, therefore, the suit must be held to have been brought within time as the respondents have not proved ouster or anything equivalent to ouster of the appellant. Many cases were cited in support of this contention including that of *Jogendra Nath v. Baladeb Das* (2), which seems to go the whole length of this contention.

The learned Vakil for the respondents referred us to a number of cases, including two decided by single Judges of this Court, namely, *Daba v. Rohtagi Mal* (3) and *Chiranj Mal v. Nathia* (4), which are not distinguishable in principle from the case now before us and certainly support the contention advanced on behalf of the respondents.

We are relieved from the necessity of discussing these cases, for it seems to us that the question is covered by the decision of their Lordships of the Privy Council in a Ceylon case to which our attention was drawn after the conclusion of the arguments, namely, that of *Corea v. Appuhamy* (5). The plaintiff in the suit had acquired the rights of Balohamy, a daughter of a man named Elias, who died in 1878 leaving as his heirs Balohamy, two other daughters, and a son named Iseris, the principal defendant to the suit. Iseris was in jail when his father died. He came out in December 1878 and took possession of the whole of the property belonging to himself and his sisters. Balohamy sued for possession in 1908 and Iseris pleaded adverse possession for more than the prescribed period. The plaintiff tried to prove an acknowledgment of her title by Iseris but failed. Iseris proved only long continued possession on his part of the whole property. The Ceylon Courts decided in favour of the defendant, but their decisions were reversed by the Privy Council. It appears to us that the ground upon which their Lordships decided in favour of the plaintiff has no reference to the special terms of the Ceylon Ordinance. It was that the possession of Iseris

(2) [1908] 35 Cal. 961=12 C. W. N. 127=6 C. L. J. 735.

(3) [1906] 28 All. 479=3 A. L. J. 334=A. W. N. (1906) 95.

(4) [1907] 4 A. L. J. 437=A. W. N. (1907) 195.

(5) [1912] A. C. 230=81 L. J. P. C. 151=105 L. T. 836.

(1) [1892] 14 All. 193=(1892) A. W. N. 55.

was in law the possession of his co-owners and that nothing short of ouster or something equivalent to ouster could put an end to that possession. Even the fact that Iseris had for years pretended that he was sole heir of his father and had sworn that the plaintiff was not his sister at all, was not considered to justify a presumption of ouster.

The case before the Privy Council was a much stronger case than the one now before us. Here there is nothing to show that the respondents denied the appellant's title till shortly before the suit was brought, and there is nothing to show that the respondents' predecessors-in-title ever laid claim to more than a half share in the property. On the contrary they did not attempt to transfer to the respondents more than a halfshare. In these circumstances it must be presumed that when the respondents took possession of the whole property they did so for themselves and their co-owner.

The judgment of their Lordships recognizes that there may be cases of an exceptional nature in which ouster may be presumed, but we can discover no grounds whatever for treating this case as falling in that category. On the contrary, as already pointed out, the respondents' vendors seem to have laid claim to no more than a half share in the property though they may have been in possession of the whole.

In our opinion the appellant was entitled to rely upon the presumption that possession was held by the respondents and their predecessors-in-title on his behalf and it lay upon the respondents to prove that they or their predecessors had set up an adverse title to the appellant's share to the knowledge of the appellant more than twelve years before the suit. This they failed to do.

We allow this appeal, set aside the decree of the lower Appellate Court and remand the case to that Court for decision on the merits. Costs of this appeal will be costs in the cause.

Appeal allowed ; Case remanded.

A. I. R. 1915 Allahabad 32

RAFIQUE, J.

Jadunandan and others—Plaintiffs—Appellants

v.

Sheobalak—Defendant-Respondent.

Second Appeal No. 451 of 1914, decided on 19th February 1915, from the decision of the Dist. J., Cawnpore.

Civil P.C. (5 of 1908), O. 23, R. 1—Suit dismissed by agreement of parties without Court's permission to bring fresh suit—Fresh suit is barred on same cause of action.

A suit for profits was dismissed on a joint application of the parties on the ground that the dispute between the parties had been referred to arbitration. The plaintiff did not ask the Court for permission to bring a fresh suit in case the arbitration fell through :

Held, that a second suit for profits for the same years was barred by the provisions of Order XXIII, Rule 1 of the Civil Procedure Code.

[P. 33, C. 2.]

30 All. 279, foll. (1865) Bourke. A. O. O. 62, ref.

Gulzari Lal—for Appellant.

Kailas Nath Katju for Tej Bahadur Sapru—for Respondent.

Judgment.—This appeal arises out of a suit for the recovery of profits. The plaintiffs-appellants are co-sharers and the defendant-respondent is the *lambadar* in the village of Arjunpur. The plaintiffs sued for the recovery of profits from 1317 to 1319 *Fasli*. One of the pleas in defence was that the claim was barred under clause (3) of Rule 1, Order XXIII. The learned Assistant Collector, in whose court the suit was filed, disallowed this plea and disposed of the case on the merits. On appeal the learned District Judge held that the claim was barred under Order XXIII, Rule 1, clause (3), and accordingly reversed the decree of the first Court. The plaintiffs have come up in appeal to this Court, and the only point raised in this appeal is whether their claim is barred under the order mentioned above. It appears that the plaintiffs had brought a similar suit in 1912 against the same defendant for the recovery of profits for the three years now in suit. During the pendency of the former suit, both parties filed a joint application to the Assistant Collector asking for the dismissal of the suit, on the ground that the matters in dispute between them, both the claim for profits and other matters, had been referred to arbitration. The plaintiffs did not take the precaution of asking the Court then to

allow them to bring a fresh suit in respect of the profits of 1317 to 1319 *Fasli* in case the arbitration fell through. The joint application of both parties was allowed and the suit was dismissed on the 20th of September 1912. The arbitrators mentioned by the parties for some reason or other declined to decide the dispute between them. On the 7th of April 1913, the suit out of which this appeal has arisen was instituted by the plaintiffs for recovery of profits for 1317 to 1319 *Fasli*. The cause of action alleged in the plaint of the present case is the same as that given in the plaint of the former case, namely, the dates on which the plaintiffs become entitled to recover the profits from the *lambardar*. It is true that the plaintiffs allege in their plaint that the arbitration has fallen through; but they do not state that the failure of the arbitration has given them a fresh cause of action. They, however, contended that their real cause of action accrued on the failure of the arbitrators to decide the disputes referred to them. The present suit is, therefore, based on a cause of action different from that alleged in the former suit. Moreover, it is said that as the defendant had joined in the application with the plaintiffs in asking the Court to dismiss the claim, Order XXIII, Rule 1, clause (3), does not apply. In support of this last contention they rely on the case of *Juggobundo Chatterjee v. Watson & Co.* (1). That case was decided under Section 67 of Act VIII of 1859. One of the learned Judges in that case remarked:—"The section only applies when the plaintiff withdraws his suit without the consent of the defendants and then renews it without a cause and that it is intended to prevent his doing so *ad libitum*. The result of applying the section quoted to the present case is so startling as to show that the section does not contemplate such a case as this." The case relied upon by the plaintiffs-appellants no doubt supports their contention. But on the other hand there is a case of this Court, namely that of *Niaz Ahmad v. Abdul Hamid* (2), which is in favour of the contention of the respondent that where a case was withdrawn by the plaintiff without obtaining any permission to

bring a fresh suit, a subsequent suit on the same cause of action in respect of the same property is barred. It seems to me that the language of O. XXIII does not make any difference as to whether the application for withdrawal is made solely by the plaintiff or is made jointly by the plaintiff and the defendant. In the present case the defendant joining with the plaintiffs in asking the Court to dismiss the suit without any reservation would not bar the operation of the provisions of O. XXIII, Code of Civil Procedure. The contention that the present suit is based on a different cause of action is not borne out by the statement made in the plaint. It is distinctly told in the plaint that the cause of action accrued on certain dates, that is, dates on which the plaintiffs became entitled to claim their share of the profits from the defendant. In my judgment the decree of the lower Appellate Court is correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 33 Full Bench.

KNOX, CHAMIER AND PIGGOTT, JJ.

In re Stamp Reference.

Stamp Reference by the Board of Revenue, decided on 26th November 1914.

Stamp Act (2 of 1899), Ss. 56 and 57—No reference with respect to imaginary documents lies.

Under Section 56 of the Stamp Act, the High Court can deal only with those instruments which are already in existence and which have been made the subject of action by the Collector, and not with such instruments as are not in existence. [P. 34, C. 1.]

A. E. Ryves—for the Crown.

ORDER OF REFERENCE.

Under Section 17 of the Bundelkhand Alienation of Land Act (II of 1903) when a Civil Court passes a decree against a member of an agricultural tribe on a mortgage made before the Act came into force, the decree is sent to the Collector who shall offer the decree-holder a mortgage in form (a) or (b) in full satisfaction of the decree. The question for the ruling of the High Court is whether such a mortgage requires to be registered and stamped or not. The Board think that neither registration nor stamping is required because (a) if the mortgage is executed on behalf of Government it is exempt from stamp duty under Section 3 (1) of the Stamp Act, (b) if this view is

(1) (1865) Bourke, A. O. C. 162.

(2) (1908) 30 All. 279=5 A. L. J. 278=1908 A. W. N. 181.

incorrect the transaction is not a new one between the parties and it would be highly inequitable to demand double stamp duty on it. The Board think that it is a substituted transaction effected by the Court's order. It is probable that the Collector when acting under Section 17 is a Court and that the mortgage is really the order of a Court, which does not require registration or stamping. This seems to be probably the reason why a mortgage under Section 17 is not mentioned in item 20 of Appendix C to the Stamp Manual.

Judgment.—In reply to our order dated the 8th of July 1914, the Secretary to the Board of Revenue sends us a sample form of mortgage under Section 6A of the Bundelkhand Alienation of Land Act and adds that there are no sample forms under Section 6B. We understand from this reply that the reference made to us does not refer to a particular deed in existence but to some deed which may or may not hereafter come into existence. Section 56 of the Stamp Act confers upon this Court power to deal with instruments which are already in existence and which have been made the subject of action by the Collector acting under Sections 31, 40 and 41 of Act II of 1899. The Board have sent on the reference under Section 57 of the above-named Act. Comparing the language of Section 56 with that of Section 57, we are of opinion that Section 57 contemplates a decision being given under circumstances and upon documents of the same nature as those referred to in Section 56 of the Act. The present case falls under neither of these Sections. We have no jurisdiction to give any opinion upon documents other than those already mentioned. We, therefore, direct that this our judgment be returned to the Board of Revenue for their information.

A. I. R. 1915 Allahabad 34

RICHARDS, C.J. AND BANERJI, J.

Budhu and others—Defendants—Appellants

v.

Dewan and others—Plaintiffs—Respondents.

Letters Patent Appeal No. 72 of 1914, decided on 11th February 1915, from the decision of Sundar Lal, J. reported in A.I.R. 1914 All. 521.

Limitation Act (9 of 1908), S. 5—Counsel's negligence held to be not sufficient cause (Per

Richards, C. J.) Counsel is liable to client for his neglect.

The neglect of the Legal Practitioner engaged is not to be deemed a sufficient reason for admitting an appeal or application after the time prescribed by law. [P. 35, C. 1.]

Where an appeal was filed to the District Judge 37 days beyond time and no explanation was given of the delay except that instructions had been given in time to a Barrister together with Rs. 40 for the purposes of filing the appeal, but he failed to file, and the District Judge admitted the appeal:

Held, that the Judge had not exercised a judicial discretion in allowing the appeal to be filed after time. [P. 34, C. 2.]

Per Richards, C. J.—If it is shown that an Advocate who is a Barrister or other professional gentleman received and accepted instructions to file an appeal or make an application and the client lost his right to appeal or make the application as the result of the negligence of the Barrister or Practitioner to file the appeal or application within time, such Barrister or Vakil is liable to his client in a Court of Law. [P. 35, C. 1.]

R. K. Sorabji—for Appellants.

Tej Bahadur Sapru—for Respondents.

Richards, C. J.—The facts connected with this appeal are fully reported [See *Dewan v. Buddhu* (1)]. It appears that a suit was brought before the Additional Subordinate Judge claiming damages for malicious prosecution. The suit was decreed in part on the 2nd of December 1912. Copies of the decree and judgment were delivered to the defendant on the 10th of December. The defendant had up to the 3rd of January 1913 to appeal to the District Judge. No appeal was filed until thirty-seven days after that date. An application was then made to admit the appeal though late. The appeal was admitted. The only facts that the learned District Judge had before him when admitting the appeal were set forth in an affidavit, in which it was stated that instructions had been given to Mr. Weston, a Barrister, together with a sum of Rs. 40 for the purpose of filing an appeal. No affidavit of Mr. Weston, was filed. No explanation was given why Mr. Weston did not file the appeal. Nor was it even alleged that the non-filing of the appeal to the District Judge was due to Mr. Weston's negligence. Under these circumstances the learned Judge of this Court considered that the District Judge had not exercised a judicial discretion when allowing the appeal to be filed after time. I do not think that we would be justified in setting aside the decree of this Court.

(1) A.I.R. 1914 All. 521=25 I.C. 30.

Even if the non-filing of the appeal were due to the neglect of Mr. Weston, the Court could hardly lay down a general rule that the neglect of the legal practitioner engaged is always to be deemed a sufficient reason for admitting an appeal, or application, after the time prescribed by law.

It is suggested that if that appeal is not admitted, the client has no remedy because no suit lies against a Barrister for neglect. I do not at all agree to this suggestion. I do not wish to be taken as expressing any opinion as to whether or not Mr. Weston was negligent. It may have been that he got some special instructions from his client as to the filing of the appeal. But in my opinion if it was shown that an Advocate who is a Barrister or other professional gentleman received and accepted instructions to file an appeal or make an application and the client lost his right to appeal or make the application as the result of the negligence of the Barrister or practitioner to file the appeal or application within time, such Barrister or Vakil would be liable to his client in a Court of Law.

I would dismiss the appeal.

Banerji, J.—I also am of opinion that the appeal should be dismissed. The learned Judge in the Court below did not subject the reason alleged for the delay of thirty-seven days in the filing of the appeal to such scrutiny as he was bound to do. He must, therefore, be taken not to have exercised a judicial discretion in admitting the appeal beyond time. On this ground alone I would hold that the learned Judge of this Court was justified in reversing the decision of the learned District Judge. I do not think it necessary to express any opinion on the other point touched upon by the learned Chief Justice in his judgment.

By the Court.—The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

A.I.R. 1915 Allahabad 35

CHAMIER AND PIGGOTT, JJ.

Abdul Haq and another—Defendants—Appellants

v.

Datti Lal and another—Plaintiffs—Respondents.

Second Appeal No. 1563 of 1913, decided on 3rd December 1914, from the

decision of Sm. C. Court J., Allahabad, dated 30th June 1913.

Transfer of Property Act (4 of 1882), S. 108 (f)—Rights of occupier of house in abadi qassaban in village Atarsuiya are transferable.

The rights of an occupier of a house in *abadi qassaban*, in *Mohalla Atala*, village *Atarsuiya*, in Allahabad are those of a lessee holding under a building lease, and as such are transferable.

[P. 38, C. 1.]

B. E. O'Connor and Zahur Ahmad—for Appellants.

Tej Bahadur Sapru—for Respondent.

Piggott, J.—In this case the plaintiffs are the proprietors of a *mahal* in village *Atarsuiya* situated on the outskirts of the city of Allahabad. The second defendant, being the owner of a house situated in the plaintiffs' *mahal*, has executed a deed of sale transferring the same to the first defendant. In the suit as originally framed the plaintiffs simply claimed one-fourth of the sale price on the basis of their alleged customary rights as proprietors of the soil. The plaint was subsequently amended so as to claim another relief in the alternative. This was that the defendants should be ordered to remove the materials of the house within a time to be fixed by the Court and that the plaintiffs should thereupon "be put in proprietary possession of the site in question together with the *kacha* built walls." I think it worth while to lay stress at the outset on two points regarding the frame of the plaint. One is that the second relief is claimed only in the alternative, in case the first relief be not granted. The other is that the second defendant is described as "resident of *Mohalla Atala*, Allahabad city." The defendants filed a joint written statement. They put their case in various alternative forms, and some of their pleadings come perilously near denying the title of the plaintiffs. They did, however, expressly admit that the plaintiffs are the proprietors of a certain *mahal* of village *Atarsuiya* and that they are entitled to receive a ground-rent in respect of the land in suit, calculated at the rate of Rs. 10 per *bigha*. Nevertheless they pleaded that the house in suit is situated in the city of Allahabad in a particular quarter of that city which was assigned, a little more than fifty years prior to the institution of the suit, by arrangement with Government and with the local landholders (including the predecessors-in-title of the plaintiffs) for the residence of a colony of butchers, and has ever since been

known by the designation of *Mohalla Atala* of Allahabad city, as stated in the plaint. They pleaded that the sites of houses in this *mohalla* are not subject to the same customary law as the sites of houses occupied by cultivating tenants, or members of the village community, in agricultural villages. More particularly, they pleaded that they were not subject to any custom affecting the purely agricultural portion of village Atarsuiya, under which the proprietors could claim one-fourth of the sale consideration on a transfer. Finally, they pleaded that the owners of houses in *Mohalla Atala* had an established right to transfer the houses themselves, and the right of residence therein, to whomsoever they pleased, and that the proprietors of the soil had no right to question any such transfer or to interfere with the owners of the houses, so long as their ground-rent of Rs. 10 per *bigha* was duly paid.

The learned Munsif of Allahabad before whom the suit was first tried, held that the tenure of the land in dispute (*i. e.*, the site of the house in question) "was subject to the same incidents as the village *abadi* land elsewhere, and that the defendants had failed to prove anything to the contrary." He held further that a certain clause in the *Wajib-ul-arz* of *Mauza* Atarsuiya which recognized a right on the part of the *zemindars* to receive one-fourth of the price, on sales of houses situated in that portion of the *abadi* not within the limits of Allahabad city, referred only to agricultural tenants, to which class the second defendant does not belong. On these findings he dismissed the claim for one-fourth of the sale price, but decreed the alternative claim for possession of the site after removal of the materials. The defendants appealed and the plaintiffs filed cross-objections with regard to the dismissal of their claim for one-fourth of the sale price. What they meant by this I find it a little difficult to understand. The plaint makes it perfectly clear that the two reliefs were claimed in the alternative. Even if it could be successfully contended on the evidence that the plaintiffs were entitled both to possession of the site after removal of the materials and also to one-fourth of the sale price, it would be a complete answer that no such case was set up in the plaint. The lower Appellate Court in the first

instance sent down certain issues for specific findings. Two of these issues relate to a very doubtful plea set up by the defendants, a plea not really consistent with other admissions in their written statement, that the land in suit had been granted to the predecessors-in-title of defendant No. 2 by the Government, and not by the *zemindars* of village Atarsuiya. In any case this point is now concluded against the defendants by an express finding of fact and was not pressed before us. The third issue remitted was in the following terms :—

"Is the land in suit in the *abadi* of village Atarsuiya? Or in the *abadi* which is called in the *Wajib-ul-arz* as *abadi shahr*?"

On this issue there was a finding in favour of the plaintiffs which has been finally endorsed by the lower Appellate Court. The form of the issue requires to be correctly appreciated. It refers to the *Wajib-ul-arz* for village Atarsuiya prepared at the Settlement of 1875 A. D. This document draws a distinction between that portion of the village area which is situated within the limits of Allahabad city and the portion outside those limits. Tenants residing within the city are recognized as having a right of transfer in respect of their houses "along with the sites," without reference to the *zemindars*. Tenants residing outside the limits of the city may sell the materials of their houses after paying one-fourth of the sale price to the *zemindars*. The finding of the lower Appellate Court is that the land in suit is situated outside the limits of the city, as those limits were understood when the Settlement Record of 1875 was drawn up. I think it would be easy to criticise the reasons given for this finding. The learned Subordinate Judge has regarded it as decisive that the site of the house in suit can be shown to have been cultivated land at the previous Settlement of 1839, and that it was part of the area dealt with at the last partition of village Atarsuiya. The latter circumstance is of no weight, unless and until it be further shown that the village area recognized as within the city limits at the Settlement of 1875 was not also formally apportioned between the various new *mahals* formed at the last partition. The former seems to me of very slight weight. I think, however, that I am bound to treat the finding as

one of fact and to decline to re-consider it in second appeal I cannot stretch the finding beyond the ground actually covered by it. We were asked to accept it as a finding of fact that the land in suit must be regarded as situated in a purely agricultural village, and, therefore, subject to all the presumptions of law which have been laid down, in various published decisions of this Court, as applicable to the sites of houses so situated. An issue of this sort has always been regarded in this Court as a mixed question of fact and of law. It is necessary to examine the facts actually found by the Court below, and then to consider whether these justify the conclusions of law upon which the decision of that Court is based. There is, as both the Courts below have recognized, another portion of the *Wajib-ul-arz* of 1875 which has an important bearing on the question in issue. In the eighth paragraph of that record reference is made to the butchers' quarter (*abadi qassaban*), in respect of which it is recorded that, inasmuch as the butchers were permitted to build upon land which had been under cultivation at the previous Settlement of 1839, they paid rent for the sites of their houses at a uniform rate of Rs. 10 per *bigha*, which rent could not be reduced and was not liable to enhancement, except by order of some competent authority or Court. This entry requires to be considered in connection with other evidence on the record, not perhaps of great value in itself, but important as explaining the formation of this butchers' quarter in village Atarsuiya. The following facts seem to have been treated by the lower Appellate Court as substantially established; they were not questioned in argument before us, and, I think, I am justified in treating them as established without discussing the precise evidence on which they rest. Sometime shortly after the Mutiny of 1857, the estates of one or more co-sharers in village Atarsuiya were confiscated by Government, on account of the disloyalty of the proprietors. The Government was, therefore, for a time a co-sharer in village Atarsuiya. At about the same time a question arose as to the advisability of settling the butchers of Allahabad in some convenient locality on the outskirts of the city. Negotiations must have taken place between the local landholders, the butchers and the Local

Government, the latter probably acting both in its executive capacity and as one of the co-sharers in the village. The result was the arrangement referred to in the eighth paragraph of the *Wajib-ul-arz* of 1875. A certain area previously under cultivation was given up by the proprietary body for the formation of the new *abadi qassaban*. The butchers, no doubt, built their own houses. They covenanted to pay a ground-rent of Rs. 10 per *bigha* to the proprietors of the soil. This seems to be a substantial rent; I notice that the learned Munsif was of opinion that it is considerably in excess of anything the proprietors could hope to obtain even now by letting this land for agricultural purposes. There was a covenant securing the permanence of this rate of rent, unless it should be lowered or enhanced by some competent authority. This last expression is, no doubt, somewhat vague; but it is impossible to interpret it as anything but a stipulation against arbitrary enhancement at the will and pleasure of the proprietors. The *abadi qassaban* thus formed is what is now known as the *Atala Mohalla* of Allahabad City, referred to in the plaint as the residence of defendant No. 2. It has long since been included within Municipal limits.

Taking these as the facts of the case, it seems to me idle to enter into a discussion of the principles involved in a series of decided cases of this Court which deal with the respective rights of proprietors of the soil and occupants of houses in purely agricultural villages. I accept, as already remarked, the finding of the Court below that the *Wajib-ul-arz* of 1875 did not intend to include this butchers' quarter within the limits of Allahabad city, the *abadi shahr* as it then stood. Even so, it seems to me decidedly questionable whether a Court would be justified in applying to an area with such a history as the above the principles laid down for house-sites in purely agricultural villages. The decisions of this Court on which the plaintiffs-respondents rely all proceed on the assumption that, in the ordinary case of occupiers of house-sites in agricultural villages, there is no definite information forthcoming as to the circumstances under which the site came to be occupied. If the occupiers of houses in such villages were to be treated, in the

absence of positive evidence to the contrary as mere squatters, it would necessarily follow that twelve years' occupation would give them an adverse title to the house-sites as against the proprietors of the village. It was felt that this would be monstrous, and would lead to all sorts of undesirable consequences. The only alternative was to regard the occupiers of houses in such villages as a peculiar kind of licensees, applying to their case certain presumptions of law which could be based upon general and well-established custom. Now the tenure of a licensee is in its essence non-transferable, and the Records-of-Rights in thousands of villages in all parts of the Province could be referred to in support of the proposition that the right of residence enjoyed by the occupiers of houses in ordinary village-sites was everywhere regarded as a right, heritable no doubt, but not transferable.

In the present case, we have fairly definite informations as to the circumstances under which the predecessors-in-interest of the second defendant came to occupy this site. The whole transaction by which this "*abadi qassaban*" in village Atarsuiya came to be created, amounts on the face of it to a letting of the village on building leases at a uniform ground rent, with a stipulation against arbitrary enhancement at the pleasure of proprietors. The contract is essentially one of lease; and the rights of a lessee, in the absence of express stipulation to the contrary, are in themselves transferable: *vide* the Transfer of Property Act (IV of 1882), S. 108 (f). The only real question to my mind is whether a stipulation to the contrary can be inferred from the evidence before us. I do not think so. Even the plaint in this case, as originally drafted, shows that the plaintiffs at first desired to bring their suit within the scope of the provision in the *Wajib-ul-arz* of 1875, which gives to tenants residing outside the city limits a right of transfer, subject to payment of one-fourth of the sale price to the proprietors of the soil. It was evidently after the plaint had been filed that a difficulty was felt by reason of the fact that this passage of the Record-of-Rights refers to *kashtkaran*, a word which as it stands must be rendered "cultivating tenants." The plaintiffs then amended their claim so as to ask for alternative reliefs. They said in effect:—"The second defendant is

either a *kashtkar* in the sense in which this expression is used in the third paragraph of the *Wajib-ul-arz*, or he is not. If he is, he can transfer his house with the right of residence thereon, but he must pay us one-fourth of the sale price; if he is not, he has no rights of transfer at all, and we claim forfeiture and possession of the soil, after the purchaser has removed the materials of the house." It was only when they filed their objections in the lower Appellate Court that the plaintiffs for the first time suggested that the clause of the *Wajib-ul-arz* in question must be interpreted as meaning that a *kashtkar* residing outside the limits of the *abadi shahr* can only transfer the materials of his house without any right of residence in the house thus transferred, and even then must pay one-fourth of the sale price to the proprietors of the soil. The lower Appellate Court has very properly ignored this plea. Having come to the conclusion that the second of two alternative reliefs must be decreed, the learned Subordinate Judge contented himself with remarking that the question of the plaintiffs' right to the first relief did not arise. I note this point because I have felt some difficulty about the present position of the plaintiffs with regard to this first relief. They have filed no cross-objections in this Court, and are obviously precluded from claiming that both reliefs ought to have been decreed. Can they ask this Court to consider their claim to the first relief asked for, in the event of the Court's holding them disentitled to the second? I incline to the opinion that it is open to them to do so. The conclusion I come to on this point is that the plaintiffs have an arguable case, but one which ought not to be accepted on the record as it stands. If the suit had gone to trial on the plaint as originally framed and upon issues arising only in respect of the claim for one-fourth of the sale price, I think it just possible that the Courts might have come to the conclusion that the word *kashtkaran* in this particular passage of the *Wajib-ul-arz* was not used in its strict sense of "cultivating tenants," but was intended to apply to all occupiers of houses situated outside the limits of the *abadi shahr*. As the case now stands, the question is much complicated by the fact that the plaintiffs have succeeded in the Courts below upon a precisely opposite contention, namely

that the second defendant and the other butchers residing in the *abadi qassaban* are not *kashtkars* within the meaning of the *Wajib-ul-arz*. If the second defendant, as lessee of the land in suit, has in fact a transferable right in respect of the house in suit and the right of residence therein, it is for the plaintiffs to satisfy the Court that this right is subject to a provision entitling the ground landlords to claim one-fourth of the sale price on each transfer. The case in favour of a loose interpretation of the word "*kashtkaran*" is partly rebutted by the proof on the part of the defendants of several instances of transfers in which no claim seems to have been preferred by the landholders to any portion of the sale price. On the record as it stands, I am not prepared to dissent from the finding of the first Court that this particular provision of the *Wajib-ul-arz* refers to "cultivating tenants" only, and does not affect the rights of the butchers occupying houses in the *abadi qassaban*.

The rights of these butchers are, in my opinion, those of lessees holding under building leases, and in the absence of evidence to the contrary they must be held entitled to transfer their rights as such lessees.

I would, therefore, set aside the decrees of both the Courts below and dismiss this suit with costs in all Courts, including in this Court fees on the higher scale.

Chamier, J.—I agree.

By the Court.—The appeal is allowed. The decrees of both the Courts below are set aside and the plaintiffs' suit is dismissed with costs throughout including in this Court fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 39

RICHARDS, C. J. AND BANERJI, J.

Ram Naresh Lal and others—Plaintiffs—Appellants

v.

Sadhu Saran Lal and others—Defendants—Respondents.

First Appeal No. 261 of 1913, decided on 4th March 1915, from the decision of the Sub. J., Ghazipur, dated 13th March 1913.

Hindu Law—Family settlement—In dispute between collaterals and widow and daughter's son, latter got proprietary possession from "generation to generation"—Held daughter's son got proprietary title.

"In order to settle a dispute as to the property of a deceased Hindu a settlement was arrived at between the nearest collaterals of the deceased Hindu on the one side and his widow and his daughter as guardian of his daughter's minor son, on the other, whereby the collaterals were put into immediate possession of a very substantial portion of the property of the deceased and the daughter's son was put in absolute proprietary possession of the rest of the property in dispute "from generation to generation."

Held, that under the circumstances of the case the daughter's son acquired a full proprietary title in the property under the settlement.

[P. 40, C. 1.]

Sunder Lal and Tej Bahadur Sapru—for Appellants.

Madan Mohan Malaviya, S. C. Banerji and Permeshwar Dayal—for Respondents.

Judgment.—This appeal arises out of a suit for possession. The claim seems an unjust one devoid of merit. The pedigree of the family will be found at page 11. The property which is in dispute belonged to one Manogilal. The plaintiffs are very distant reversioners being some seven degrees removed. Manogilal died in the year 1858 leaving a widow *Musammam Dakho* and a daughter *Musammam Raji Kunwar*. Raji Kunwar had a son Adit Prasad who left a widow *Musammam Pranpat Kunwar* who died in the year 1911. The present suit was instituted on the 27th of September 1912. Dakho Kunwar died in the year 1880. Her grandson, Adit Prasad, died also in 1880. It is not quite certain whether he died before or after his grandmother. Raji Kunwar died according to the plaintiffs in 1905. According to the defendants she died about 14 years before the institution of the suit. The plaintiffs' claim is that upon the death of Manogilal the estate vested in his widow *Musammam Dakho* for the ordinary estate of a Hindu widow, that on her death it vested on her daughter, *Musammam Raji Kunwar*, and that accordingly the plaintiffs, as reversioners, became entitled upon her death, which, as we have mentioned above, is alleged by the plaintiffs to have taken place in the year 1905. It is somewhat remarkable (even if we assume that this lady died in the year 1905) that the plaintiffs did not institute their suit until September 1912, which was about a year after the death of *Musammam Pranpat*, the widow of Adit Prasad. We find that prior to the year 1879 there had been disputes as to the succession to the property between the persons who would

have been the apparent reversioners had the property descended in the way alleged by the plaintiffs and had *Musammatt Dakho* been in possession as a Hindu widow. The persons who then disputed were the sons and grandsons of one Subhao Singh, the plaintiffs all claim in this line of descent. These persons seem to have attempted to make out that Manogilal was a member of a joint Hindu family with them at the time of his death. They apparently had failed in this attempt. A settlement, however, to avoid further litigation was arrived at between the then claimants and *Musammatt Dakho* and *Musammatt Raji Kunwar* acting on behalf of themselves and of Adit Prasad, who was then a minor. Under the terms of the settlement the then claimants, that is to say, the forefathers of the present plaintiffs, were put into immediate possession of a very substantial portion of the property and Adit Prasad was put in absolute proprietary possession of the property in dispute "from generation to generation." It is to claim this last mentioned property that the present suit has been instituted by the plaintiffs. We find that after this settlement mutation of names was effected in accordance with the settlement in favour of Adit Prasad and after his death in favour of his widow. The Court below has held that the widow of Manogilal accelerated the estate of Adit Prasad. It seems to us that having regard to the terms of the settlement this result was highly probable. It is a fair presumption from the manner in which the entry of names was made, that the devolution of the estate was so accelerated. As a matter of fact Adit and after him his widow continued in possession; we have already pointed out that this suit was not instituted until after the death of the widow of Adit. We find that litigation ensued in the year 1884 and the compromise, referred to above, was the subject of that litigation and came before the High Court in an appeal. The High Court held on the 27th of November 1888 that Adit Prasad acquired a full proprietary title in respect of the property dealt with by the agreement. If Adit Prasad did acquire proprietary possession, then the plaintiffs are not the reversioners to his estate. We agree with the finding of the Court below that Adit Prasad did acquire a full proprietary title in the property, and we entirely agree with the decision of the

Court below and dismiss the appeal with costs including in this Court fees on the higher scale. *Appeal dismissed.*

A.I.R. 1915 Allahabad 40

TUDBALL, J.

Kuer Sen and others—Defendants—Appellants

v.

Sukhhkho—Plaintiff—Respondent.

Second Appeal No. 1527 of 1913, decided on 21st November, 1914, from the decree of the Sub-J., Bareilly.

(a) *Contract Act* (9 of 1872), S. 23—*Agreement not to divide share without vendor's consent is not illegal.*

A condition imposed in a sale-deed that the vendees would not partition the share purchased without the consent of the vendor; is not opposed to public policy, as no right is absolutely given up, and the vendor is entitled to compensation for the breach of such condition. [P. 41, C. 1 & 2.]

(b) *Damages—Measure—Amount fixed by parties is proper—Contract Act, S. 73.*

Where the parties have themselves fixed the value of their right, that amount is a proper measure of the damages sustained by a party. [P. 41, C. 2.]

Brijnath Vyas—for Appellants.

Sital Prasad Ghosh—for Respondent.

Judgment.—The case for the plaintiff-respondent in this appeal was as follows. She stated that on the 12th of July 1907 she sold to Mihi Lal and Thakur Das certain immoveable property for the sum of Rs. 900, that the vendees agreed in the sale-deed that they would not partition the share purchased without the consent of the plaintiff and that they also would not interfere with her retention of the post of *lambardar*, that the two vendees represented to her that the value of the concession they had made in regard to partition and *lambardari* was at least Rs. 250 and asked her to forego that sum in their favour out of the purchase-money. She agreed to this and remitted Rs. 250, though at the time of the registration she admitted receipt of the full Rs. 900, that Thakur Das and Mihi Lal subsequently applied for partition of the share, that she objected and after appeals to the Collector and the Commissioner the application for partition was dropped, that after the death of Thakur Das, who died childless, Mihi Lal had now applied for partition and the Revenue Court, having acquiesced, it was being carried out. She, therefore, sued, primarily, for an injunction against Mihi Lal to restrain him from proceeding with the partition and in the alternative she claimed

the sum of Rs. 250, stating it to be unpaid purchase-money. The Courts below have found the facts in favour of the plaintiff and they have granted her a decree for Rs. 250 *plus* interest from the date of the sale, recoverable as unpaid purchase-money, by sale of the property in question. The defendants have come here in second appeal. They plead that the sum of Rs. 250 was in no way unpaid purchase-money, that the plaintiff was not entitled to recover the money as such, that that portion of the contract relating to the right of partition was contrary to public policy and as such void and, therefore, not enforceable and the plaintiff is not entitled to recover anything at all. Stress is laid on Sections 23 and 28 of the Contract Act. Section 28, in my opinion, hardly applies. Section 23 possibly may apply. It is quite clear to me that the claim for Rs. 250 can in no way be a claim for unpaid purchase-money. On the plaintiff's own showing the purchase-money was Rs. 900, but owing to the persuasion of the vendees she actually remitted Rs. 250 out of the consideration for the property, in view of the fact that the vendees had agreed to the two conditions mentioned. This is equally clear from the fact that the plaintiff has stated that her cause of action arose not on the date of the sale, but on the date on which Mihi Lal applied to the Revenue Court for partition and the Revenue Court passed an order in his favour. There cannot be the slightest doubt that if Mihi Lal had not applied for partition, this suit would never have been brought. I note here that the prayer for injunction was dismissed by the Court below and it is not pressed in this Court. On the facts found it is clear that if the contract be not void, then the plaintiff is merely entitled to recover damages for the breach of the contract.

In regard to the contract itself, so far as it relates to the partition, it is pleaded that such a contract is contrary to public policy, as it is a limitation of the right of ownership which passed under the sale-deed. Looking at the matter from all points of view, it seems to me that the meaning of the parties was only this much that in the life-time of the plaintiff the vendees would not apply for partition except with her consent. No right was absolutely given up, and I am not prepared to hold that such a

contract is against public policy and, therefore, void. It is a condition which would not be binding on the heirs of the vendee but as against Mihi Lal, I think the condition is binding. The suit was instituted as against him and the plaintiff, in my opinion, was clearly entitled to a decree for compensation.

The question remains as to the proper measure of that compensation. On the facts found by the Court below, it is clear that the parties themselves had fixed the value of the right at Rs. 250 and that sum, in my opinion, will be a proper measure of the damages sustained. The plaintiff, therefore, is entitled to a decree for that sum, but she is not entitled to a decree for sale nor is she entitled to interest for any period prior to the breach of contract. I, therefore, allow the appeal to this extent that I modify the decree of the Court below and give the plaintiff a simple money-decree for that sum of Rs. 250 *plus* interest at 6 per cent. per annum from June 25th, 1912, upto the date of payment. In so far as the Courts below are concerned the plaintiff will have her costs in both those Courts. In so far as this Court is concerned the parties will pay their own costs.

Decree modified.

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CHAMIER AND PIGGOTT, JJ.

Parbhu Dyal—Objector—Appellant
v.

Harcharan and others—Decree-holders—Respondents.

Ex. First Appeal No. 6 of 1914, decided on 3rd December 1914, from the decision of the Sub-J., Muttra, dated 27th November 1913.

Hindu Law—Gift—Bequest or gift to some to exclusion of other members creates separate interests when donees not heads of joint family—Hindu Law—Will.

Where the devisees or donees are only some of the members of a joint Hindu family, and there is a clear intention to exclude the remaining members of the family and to confer on the devisees or donees interests to be held separate from any property which the joint family may happen to possess there is no ground for assuming that the devisees or donees were intended to hold the property as co-parceners in the sense of the Hindu Law, though it may well be otherwise when the devisees or donees are all the members or heads of a joint family. 10 I. C. 565 Ref.

[P. 44, C. 1, and 2.]

Sunder Lal—for Appellant.
B. E. O'Connor and *L. M. Banerjee*—
 for Respondents.

Chamier, J.—The firm, of which the respondents to this appeal are the present proprietors, brought a suit for Rs. 19,000 odd in the Bombay High Court against the appellant, Parbhu Dyal, and his father, Ajudhia Prasad. The suit was dismissed against the appellant but was decreed against Ajudhia Prasad. In execution of their decree the respondents attached a 15-*biswas* share in *Mouzah* Badhar in the Muttra District, alleging that it was the property of Ajudhia Prasad. The appellant objected to the attachment, asserting that the whole of the share was his property and that his father had no interest whatever in it.

The Court below has held that Ajudhia Prasad has an interest in the property as a member of a joint family consisting of himself and his sons, and that that interest is liable to attachment and sale in execution of the respondents' decree. It, therefore, allowed the objection in part. Parbhu Dyal has appealed and the decree-holders-respondents have filed cross-objections. Ajudhia Prasad is the adopted son of one Narain Das, a well-to-do *Banya* who carried on business in Muttra, Delhi, Hathras and elsewhere. In 1878 Narain Das bought a 10-*biswas* share in the village now in question. A few years later he built a temple in the village and dedicated half of the share to the upkeep of the same. He died in January 1884 and in September 1885 the remaining 10 *biswas* of the village were taken over by his representatives in lieu of a debt of Rs.13,000 due to the deceased. A few days before he died, he made a Will which has been the subject of much discussion before us. After revoking previous Wills, he says that he has adopted Ajudhia Prasad but thinks that he is unfit to carry on the business, therefore, he makes the following arrangement:—

1. Five men named are to be managers of the business of the different *kothis* and are to act under the instructions and supervision of his widow, *Musammatt* Raj Koer, who is to be owner and executrix (*malik-o-wast*).

2. The five men named are to carry on the business under the general orders of the widow. In case of loss, actual or anti-

cipated, the widow with the concurrence of the five men is authorised to close the whole or any part of the business.

3. The widow is authorised to dismiss, suspend, or transfer servants.

4. Each of the managers is to be moved on every year to another branch and accounts between the branches are to be settled every year. The widow may dismiss any of the managers for good cause, but only with the concurrence of the rest.

5. Ajudhia Prasad is to have Rs. 25 per mensem, but the allowance may be increased by the widow with the concurrence of the managers. On the occasion of a birth or death in his family something extra may be paid to him.

6. Certain allowances are provided for his daughters.

7. Certain sums are to be paid annually to the managers and the widow is authorised to increase the amounts in case of good service.

8. Provision is made for the temple.

9. The stock of the different *kothis* is said to be entered in the books. All the gold and silver ornaments are to be enjoyed by the widow. After her death the ornaments and all the property, movable and immovable, are to be disposed of as the widow may direct by Will made with the concurrence of the managers.

10. All expenses of management, etc., are to be arranged for by the managers under the direction and with the concurrence of the widow.

11. Suits are to be brought in the name of the widow or any of the managers nominated by her.

12. If any manager dies, the widow and the surviving managers are to appoint another. After the death of the widow the managers are to carry on the business. In the last resort the Government may arrange to carry on the business and give effect to the Will, but only if the widow and all the managers are dead or have declined to carry on.

13. All the property specified at the foot of the Will, except houses Nos. 1 and 5, and all property not entered in the list are declared to be the testator's own acquisitions. Ajudhia Prasad and his wife have no right to it and if they lay any claim it is to be registered.

In the description of the first house in the list, it is said that the house is ances-

tral property but a *kotha* and a *dalan* in it are said to be self-acquired by Narain Das.

There is nothing to show that there was in the hands of Narain Das any ancestral property except the two houses. It was suggested that these houses should be regarded as the nucleus of the property amassed by Narain Das and, therefore, that the whole should be treated as the joint property of Narain Das, his son and grandsons. Nothing of the kind seems to have been suggested in the Court below, and we have no evidence that either of the houses brought in any rent. In the circumstances all the property left by Narain Das with the exception of the two houses must be regarded as his self-acquired property.

The appellant's case is that the widow, *Musammnat* Raj Koer, became under the Will of her husband full proprietor of all the self-acquired property, that on December 11th, 1897, she made a Will whereby she passed over Ajudhia Prasad and left all the property to his three sons, Parbhu Dyal (the appellant), Damodar Das and Nityanand, as joint owners, that Damodar Das died in the life-time of Raj Koer and the disposition, therefore, took effect in favour of Parbhu Dyal and Nityanand, and that on the death of the latter in March 1900 Parbhu Dyal, the appellant, became by survivorship sole owner of the property and, therefore, no part of it can be attached in execution of a decree against his father.

The respondents' case is that the Will of Narain Das does not confer on *Musammnat* Raj Koer more than an estate for life of the most and that on her death, the whole property devolved upon Ajudhia Prasad. They also contend that the alleged Will of Raj Koer has not been proved.

The Court below has accepted the respondents' contentions regarding the two Wills, but has held that the property devolved upon Ajudhia Prasad and his sons. The learned Subordinate Judge seems to have been under the impression that at least two sons of Ajudhia Prasad are living, but it is common ground that Parbhu Dyal alone is now living. According to the findings of the Court below the interest of Ajudhia Prasad in the village is an undivided half of 15 *biswas*, the remaining five *biswas* being the property of the temple.

At the hearing the respondents' learned Vakil said that he would be satisfied with a finding that only an undivided half of 15 *biswas* was liable to attachment in execution of the respondents' decree.

The Will of Narain Das is a most curious document and gives rise to a difficult question, whether he really intended to give Raj Koer full proprietary rights in his estate. Some of the provisions are hardly compatible with the view that he intended to give her full proprietary rights. The truth appears to be that in his desire to arrange for the proper conduct of the business which had been his idol, he overlooked the necessity for carefully defining the interest of the widow. On the whole, however, I incline to the view that the Will confers upon the widow a full proprietary estate and that the provisions which appear to make her dependent upon the five managers are not intended to cut down her estate. But in the view which I take of some other questions in the case, the result appears to be practically the same whether the widow of Narain Das took a full proprietary estate or only a life-interest.

The Court below finds that the alleged Will of Raj Koer has not been proved. The Subordinate Judge thinks it suspicious that the Will was not registered and that it was not mentioned till 1902. He also thinks that it bears internal evidence of having been prepared to meet events which did not happen till after Raj Koer's death and could not have been foreseen. I think that sufficient reason has not been given for rejecting this Will. It was mentioned and the date and purport of it were given in the written statement filed in the Bombay High Court in 1900 on behalf of Parbhu Dyal, and we find that less than a month after Raj Koer's death a petition was presented to the Revenue Authorities by Ajudhia Prasad's wife, Ram Koer, on behalf of her minor sons, Parbhu Dyal and Nityanand, in which it was stated that the two boys were the heirs of Raj Koer. A report to the same effect was made by the *Patwari* of the village and on April 25th, 1899, mutation of names was effected in their favour (see the copy of the order of that date and of the extract from the *Khewat* for 1306 *Fasli*, which should be read with the extract from the *Khewat* for 1305 *Fasli*.) It is true that on that occasion the Will of Raj Koer is not actually

mentioned, but in the absence of such a Will there was no reason for describing the two boys as heirs of Raj Koer. The Subordinate Judge does not refer at all to the evidence of the *Patwari*, Chitar Mal, who swears that the Will was executed in his presence, nor to the evidence of Sita Ram taken on commission in the case in Bombay, nor to the evidence of Sita Ram's son, Ram Nath, who swears that the Will is in the handwriting of his father and is signed by him at the foot. I see no reason for rejecting the evidence of those witnesses. Nor do I think that the Will bears internal evidence of having been fabricated. It is not a matter for surprise that Raj Koer should wish to disinherit Ajudhia Prasad, considering that his adoptive father had declined to leave any property to him and Ajudhia Prasad had failed to keep the business going. All Wills are not registered and in face of the evidence referred to, I am unable to reject the Will merely because it was not registered.

As Damodar Das died in the life-time of Raj Koer the Will took effect in favour of the two surviving sons of Ajudhia Prasad, namely, Parbhu Dyal and Nityanand (the latter's name is badly written in some of the documents and was actually read as Baldeo Dat by the Court Reader, but the name appears to be Nityanand). The question is whether on the death of Nityanand in March 1900 his interest passed to his father Ajudhia Prasad or to his brother Parbhu Dyal. It is clear that the devise to Parbhu Dyal and his brother was not intended to take effect in favour of them and their father, who was presumably joint with them; but was it intended to confer upon them a joint interest with rights of survivorship *inter se*. A similar question arose in *Kishori Dubain v. Mundra Dubain* (1) and it was held that the fact that two devisees or donees of property were living in union as members of a joint Hindu family, was not necessarily a sufficient reason for holding that they took a joint estate with rights of survivorship *inter se*. It appears to me that when the devisees or donees are only some of the members of a joint family and there is a clear intention, as in this case, to exclude the remaining member of the family and to confer on the devisees or donees interests to be held separate from any property

which the joint family may happen to possess, there is no ground for assuming that the devisees or donees were intended to hold the property as co-parceners in the sense of the Hindu Law. It may well be otherwise when the devisees or donees are all the members or even the heads of a joint family. Having regard to the circumstances in which the Will of Raj Koer was made, I am of opinion that the two brothers, Parbhu Dyal and Nityanand took separate interests. Accordingly when the latter died, his share passed to his father, Ajudhia Prasad, that share amounted to $7\frac{1}{2}$ *biswas* in the village and can, in my opinion, be attached and brought to sale by the respondents-deceesholders.

In practical purposes the same result follows if Raj Koer took only a life-interest in the 15-*biswas* share. On her death it would have passed to Ajudhia Prasad and his sons and the interest of Ajudhia Prasad would now be an undivided half of the 15-*biswas*.

For the above reasons I am of opinion that the appellant's objection should have been allowed as regards a $7\frac{1}{2}$ -*biswas* share in the village and I would modify the order of the Court below accordingly.

Piggott, J.—I concur.

By the Court.—The decree of the Court below is modified. The appellant's objection is allowed as regards $7\frac{1}{2}$ -*biswas* in the village. Parties will pay and receive proportionate costs throughout and costs in this Court will include fees on the higher scale.

The cross-objections are also dismissed.
Decree modified.

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RICHARDS, C. J. AND BANERJI, J.
Gopal Lalji—Plaintiff-Appellant

v.

Girdhar Lalji and others—Defendants-Respondents.

First Appeal No. 329 of 1913, decided on 25th February 1915, from the decision of the Sub-J., Muttra, dated 27th August 1913.

Hindu Law—Religious office—Gift by goswami of Ballavacharya sect is valid and not against custom.

A *goswami* of the *Ballavacharya* section has specific interest, capable of being partitioned and transferred, in the property held by him, including even the temple and idol. Hence a gift made by one *goswami* of his interest in the pro-

perty held by him to another *goswami* and his successors-in-office is lawful and not contrary to the customs and usages of the cult. [P. 49, C. 1.]

S. N. Sen, Sunder Lal and S. C. Banerji—for Appellant.

Moti Lal Nehru, D.C. Banerji, Jawahir Lal, L.M. Banerji, Benode Bihari and R. K. Malaviya—for Respondents.

Judgment.—The suit out of which this appeal arises relates to certain disputes between *Ballavacharya Goshains*. A case relating to the customs of this sect lately came before their Lordships of the Privy Council in the case of *Mohan Lalji v. Gordan Lalji Maharaj* (1). The principal defendant in the present suit was the respondent in that case. Their Lordships in referring to the history of the sect made the following observations :

"The *Ballavacharya* cult, in reality an off-shoot of *Vaishnavism*, was founded in the sixteenth century of the Christian era by one *Ballavacharya*, who is usually designated among his followers and disciples as *Maha Pirbhuj*. He and his descendants, who constitute the *Ballavacharya Goshain kul*, are held in great veneration by the members of the sect and regarded as the incarnation of the famous and favourite Hindu deity, Krishna, whom in common with other *Vaishnavs* (*Vishnuvites*) they worship. The cult established by *Ballavacharya* differed in several particulars from the practices in vogue among other votaries of Krishna, the principal point of difference consisting in the fact that he repudiated the practice of celibacy and asceticism practised by the other *gossains*.

"The *Ballavacharya Goshains*, in other words, the descendants of *Ballav*, possess several principal temples, each of which is presided over by a member of his *kul* or family, who is styled a *tikait*.

"The defendant *Gordhan Lalji* is in possession of one of the most important of these temples, if not the most important, which is situated at *Nathdwara* in the *Odeypore State*."

The sect possesses a number of temples in different parts in India; including a considerable amount of immoveable property. Large offerings are made from time to time by the votaries of the sect. In the present case it would seem that there are

or were offerings coming even from *Zanzibar*.

The immediate cause of the present suit was a deed of gift, dated the 2nd of April 1910. The document is in the form of an indenture and is made between *Goswami Shri Girdhari Lalji Maharaj* (the first defendant) of the one part and "*Goswami Tikayet Sri 108 Sri Goverdhan Lalji Girdharji Maharaj of Sri Nathdwara*" of the other part. This document, after reciting the title of the grantor to "one-fourth part or share in all the hereditaments and premises in the schedule hereto more particularly described" and mentioned, granted, conveyed and assured in absolute gift to the grantee and his successors in office to the *gaddi* of *Sri Nathji* all that one-fourth undivided equal share and interest of the grantor in all these pieces or parcels of lands *et cetera* more particularly described in Schedule A thereunder written, to hold the said lands, hereditaments and premises and all and singular the other premises thereby granted and assured, or intended so to be, with their and every of their members and appurtenances into the use of the grantee and his successors to the *gaddi* of *Sri Nathji* to the only proper use and benefit of the grantee and his successors in office for ever. The first item in the schedule is "one temple building of *Shri Naunit Priyaji Maharaj alias Raja Thakur*, with all the images including *Shri Raja Thakur* installed therein." The second item is "one temple building of *Shri Dauji Maharaj*." The third and fourth items are *batthaks*. The fifth item is "the *zamindari* and *muafi* rights of the whole village of *Gokul* consisting of two *mahals*, that is, old and new *Gokul* and all the *abadi* rights to tanks, grounds, habitation, ghats, the river, *et cetera*, and all sorts of income from *Mandi Bazar Tolai Sewai*, and all other rights whatsoever relating to the *Sri Raja Thakur*". There are two items of property in all in the schedule the twentieth and last item being images in the temple of *Shri Naunit Priyaji Maharaj*.

The present suit has been instituted for the purpose of obtaining a declaration from the Court that this deed of gift is ineffectual, null and void. In the plaint the plaintiff alleged that he was the sole manager and *gaddinashin* of the temple and as such solely entitled to the property, one-fourth of which purported to be

granted by the deed in question. The contention in this Court was that the plaintiff, the defendant No. 1 and the defendant No. 2 constituted a corporate body of trustees of the temple and its property and that accordingly the defendant Girdhar Lalji had no specific interest in the temple or the property, and no right to make the deed of gift.

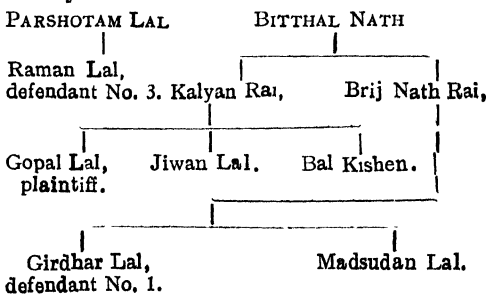
There can be no doubt that if we must regard the property as "trust" property in the strict sense, dedicated for a charitable or religious purpose in the hands of duly constituted trustees of the charitable or religious object, one or more of such trustees would have no power to alienate the trust property or delegate their powers and duties contrary to the trust. In the present case the plaintiff has endeavoured to show that such a trust existed and that Goswami Sri Girdhar Lalji occupied the position of one of three joint trustees on whom, according to custom and Hindu Law, the trust had devolved. He contends that even if numerous transfers and alienations are proved to have taken place in the past, such alienations and transfers were breaches of trust. The defendants on the other hand contend that the transfer complained of could legally be made, that there was nothing in it contrary to law or to the usages and the customs of the sect. They have adduced a large amount of evidence showing how this property and other property of a similar nature (as they allege) have been dealt within the past by members of the sect including the plaintiff himself. They say that these dealings were not and have never been considered by the sect as contrary to law or to their customs and usages. In considering the evidence and the inference to be drawn from such evidence, we think that we should bear in mind that the cult hold the theory that they are incarnations of the deity and the fact that the transfer complained of was made in favour of a member of the cult, holding a very exalted position therein.

The first transactions dealing with the property is a deed executed in the year 1852 by a lady named Janki Bahuji Maharaj, widow of Goswami Sri Govindji Maharaj. The opening clause is as follows: "I now having become old have made Goswami Bitthal Nathji and Parshotamji, who are my sister's son's sons, the pro-

prietors of my house, that is of the following." Then follows a description of the property commencing with "Sri Thakurji Shri Naunit Lal Priyaji with temple". The property includes *zemindari* and *muaf-laga* in Zanzibar, income from Jodhpore, etc., etc. It is evident from this document that the lady had no sons. She had a daughter's son for whom she made some provision, but the idol, temple, etc., were given to Goswamis Bitthal Nathji and Parshotam Lalji. The explanation of the exclusion of the daughter's son was probably the custom of the sect. The daughter's son would be a *bhat* and incapable of performing *puja* (See the decision of their Lordships in the case already referred to). The important part of the deed is that the lady treats the property as her own and makes the donees "proprietors".

The validity of this document was challenged first by Ranchhore Lal (the donor's daughter's son) and afterwards by persons alleging themselves to be reversioners of Goswami Sri Govindji, the husband of the donor. The deed was upheld and the property or at least the temple from that time remained in the hands of Bitthal Nathji and Parshotamji and their descendants up to the time of the transfer complained of in the present suit.

We here give a short pedigree of the family:—



The next transaction of importance took place in March 1888. Sri Kalyanji, Sri Brij Nathji (the sons of Bitthalji) and Raman Lalji (the son of Parshotam Lal) partitioned certain property between them. The partition was carried out by means of a submission to arbitration and an award. The property partitioned included 16 temples. Clause 2 of the award says: "The property, a detail of which has been ascertained up to this time, has been divided. The parties will be owners by halves of any other property which may be found

to exist in addition to the said property." Clause 3 : " besides the property divided mentioned above, the parties are *owners by halves* of (1) the temple of Thakur Sri Dauji Maharaj, (2) the temple of Madan Mohanji Maharaj situate in the city of Muttra, and (3) the temple of Thakur Sri Naunit Lalji Maharaj, known as Raja Thakur, situate in Kasba Gokul. The parties will be the owners of and responsible for the expenses connected with the money dealings carried on at the temples of Thakur Dauji, Madan Mohanji Maharaj and Sri Naunit Lalji Maharaj *by halves*." This partition seems to indicate that the parties to it (influential members of the cult) considered that there was nothing wrong or contrary to the usages of the sect in partitioning their temples and property held in connection with the temples. It is contended on behalf of the plaintiff that the temple of (1) Thakur Sri Dauji, (2) Madan Mohanji and (3) Naunit Lalji (the temple now in dispute) were not partitioned. This is not quite correct, because Clause (3) provides that the parties should be owners of these three temples *by halves*; besides there is nothing to show that these temples and the property connected therewith differed in any way in their nature and origin from the rest of the property which was more completely partitioned. The probabilities are that all the property including the property in dispute was acquired in the same way. In May 1888 Kalian and Brij Nath mortgaged to an outsider some of the property allotted to them under the award. By deed, dated the 18th of October 1894, Madhsudan (the son of Raman, son of Parshotam) after reciting the arbitration award and that he had acquired a *gaddi* and properties in Ahmedabad, relinquished his $\frac{1}{2}$ th share in favour of his brother, Sri Girdhar Lalji (the interest in the temple of Naunit Lalji is included in this relinquishment).

On March 23rd, 1895, Sri Raman Lal made a gift of four *bigas* odd to his Pandit, one Damodarji. It is not quite clear whether this plot was or was not part of the property granted by Janki Bahu in 1852. In January 1899 the plaintiff (Sri Gopal Lalji) sued Girdhar Lalji for contribution to the expenses of the temples. In the plaint he set forth the deed of relinquishment, already mentioned, by Madhsudan in favour of Girdhar Lalji,

thereby recognizing the right of Madhsudan to make the relinquishment and the title of Girdhar Lalji to a specified share. Girdhar confessed judgment and the plaintiff got his decree. In March 1899 an outsider sued Girdhar Lalji and obtained a decree; his property was attached and the plaintiff purchased it.

By a sale-deed, dated 2nd July 1902, after reciting the arbitration award and reciting the deed of relinquishment and reciting the purchase at auction-sale of the interest of Girdhar Lalji, the plaintiff, Gopal Lalji, sold to a person, who was not a member of the sect, part of the property partitioned in 1888. Another somewhat similar sale was made by the plaintiff in March 1903. There were other similar sales. On the 16th of September 1906 the plaintiff executed a *sanad*. This *sanad* recited the arbitration award of 1888 and the titles of the plaintiff and Girdhar Lalji to specified shares in the temples at Muttra and Gokul are therein fully recognised. By this *sanad* the plaintiff agreed to the partition of the temple in dispute (*inter alia*). The plaintiff corresponded with the defendant, Tikait Gobardhan Lalji, with regard to this proposed partition. No one suggested that there was anything wrong in partitioning the property. The letters will be found at pages 91 and 92 of the respondents' book. This was long before the transfer now complained of, and it is significant that the plaintiff communicated to a person holding the position of Tikait Gobardhan the proposed partition. In 1904 Raman Lalji, Brij Pal Lalji (a son of Raman Lalji) and Ghansham Lalji (another son of Raman Lalji) made a partition between them. This partition was also carried out in the shape of an arbitration award, dated the 20th of January 1904, a copy of which will be found at page 2 of the supplementary book of evidence of the respondents. The award sets forth that the party to whom a particular temple has been awarded shall be the *owner in possession* of that temple and also of every kind of property appurtenant thereto as a proprietor, *competent to make* all sorts of transfers. In this award the temples were partitioned, including even the idols, that is to say, some idols were allotted to one party and some to another.

In 1908 another partition of much the same nature, also carried into effect by an arbitration award, was made. The award

is dated the 27th of March 1908. The parties to the partition were Raman Lalji and the plaintiff, Gopal Lalji.

A suit was brought by Ghanashiam Lalji to set aside this last-mentioned award. Gopal Lalji was made a defendant to that suit and he filed a written statement on the 19th of May 1912, in which he pleaded that the temples and property were not a public *waqf*, that according to the practice of the Ballab cult the awards were valid and enforceable. He further pleaded that the temples of Madan Mohanji and Dauji were the *devater* of a peculiar kind.

The plaintiff's own evidence given in the present suit seems to indicate that even now he recognises and considers that particular temples and idols are the private property of individual *gossains*. He was asked the following question: "Do the temples of Dauji and Madan Mohanji at Muttra and the property appertaining thereto which are in your and your family's possession form endowed property?" An objection was taken by the plaintiff's Pleader to this question, on the ground that it was not relevant. The plaintiff answered the question in the following way: "They do not form endowed property. They are my private property." He was asked what he meant by "private property" and the answer he gave was: "A property is said to be endowed when it is entirely recorded in the name of the Thakurji and is not brought to private use, nor is it given or sold or transferred in any way. A property is said to be private when it is used by the owner in any way he likes." He was asked if any of the five *gaddis* were endowed and he said "none of them".

The plaintiff relies on certain evidence which goes to show that part of the property was revenue-free at a very early date and further, that some of the property was released from attachment in execution of decrees on the ground that it was "trust" property. We can attach very little importance to the fact that some of the property has been revenue free. The sect is no doubt a religious sect and it is not surprising that part of the property was allowed to remain free of revenue, nor can we attach much importance to the release of the property from attachment in the face of the evidence to which we have already referred which shows that property, which we think was exactly of the same nature, was attached and sold in execution of decrees, purchased

by the plaintiff himself and subsequently sold to strangers. The evidence which the plaintiff's learned Advocate relied upon more than any other was a judgment of the High Court, dated the 15th of April 1897. That was a suit by Raman Lalji against Gopal Lalji and his side of the family. The claim was that the Court should decree that one side should perform worship in the temples for a fixed period and that then the other side should have a like fixed period. The Court dismissed the suit. In the judgment of this Court the learned Judges made the following observations: "The parties here are the joint managing trustees of the temples whose duty it is as such to manage the affairs to the best of their united abilities, a duty which they undertook to perform when they accepted the trust. They have no rights of property or any personal pecuniary interest in the subject-matter of the trust. Is one of such trustees entitled to ask a Court to partition the duties of the trust between himself and his co-trustees, and, for example, to give him the exclusive management of and possession of the trust property for say six months in each year, putting the other trustees entirely aside during his period of management"? Before this case came before the High Court there had been a statement made by the Pleaders as to the *goshains* having no pecuniary interest in the temples, and this no doubt led largely if not entirely to the remarks of the learned Judges quoted above. If we regard these statements merely as admissions as to how the property was held, they do not seem of much importance having regard to the large volume of evidence to which we have already referred, proving that the sect recognised that the property and temples were capable of being partitioned, though perhaps not in the particular way the then plaintiffs sought to partition them. The statements were apparently made by the Pleaders for the purpose of the particular case before the Court.

It is said that the decision operates as *res judicata*. Having regard to the nature of the claim in that litigation and the claim in the present litigation, we certainly cannot regard the decision as *res judicata*. The plaintiff in the present suit and Girdhar Lalji, the donor, in the deed of gift complained of were arrayed as parties on the same side. No issue was decided

between them which would decide the present case. After considering the evidence we think there can be no doubt that this sect always regarded themselves as having specific interests capable of being partitioned in the property held by them including even the temple and idol. It is unnecessary for us in the present case to decide how far the whole or any particular part of the property could be validly alienated to strangers. All that we have to decide in the present case is whether or not the alienation complained of, made as it was in favour of a very exalted member of the cult and his successors in office, is unlawful or contrary to the customs and usages of the cult. In our opinion the plaintiff has wholly failed to establish this. We think that the decree of the Court below is correct and ought to be affirmed. We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 49

RICHARDS, C. J. AND BANERJI, J.
Kanhi Ram—Defendant—Appellant
 v.

Durga Prasad and another—Plaintiffs
 —Respondents.

Letters Patent Appeal No. 62 of 1914, decided on 22nd January 1915, against the decision of Sunder Lal, J., in S. A. No. 1377 of 1913, dated 16th July 1914.

(a) *Agra Tenancy Act* (2 of 1908), S. 95—*Scope of—Suits between rival claimants to tenancy are cognizable by Civil Courts.*

Section 95 of the *Agra Tenancy Act* deals with questions arising between landlord and tenant, and not between rival claimants to a tenancy.

[P. 49, C. 2.]

Therefore, a suit between rival claimants to a tenancy is cognizable by a Civil Court.

[P. 50, C. 1.]

(b) *Civil P. C.* (5 of 1908), S. 11—*Revenue Court's finding that plaintiff was sub-tenant is not res judicata in civil suit by plaintiff claiming holding.*

A decree of a Revenue Court in a previous suit, holding that the plaintiff was the sub-tenant of the defendant in respect of the holding, does not operate as *res judicata* in the plaintiff's suit in the Civil Court to establish his claim to the holding. 17 I.C. 376 and A.I.R. 1914 All. 460 Ref.

[P. 49, C. 2.]

Lakshmi Narayan—for Appellant.

Judgment.—This appeal arises out of a suit which was brought under the following circumstances :—

The defendant in the present suit brought a suit in the Revenue Court against the plaintiff in the present suit, alleging that he was his sub-tenant and seeking to eject him. The Revenue Court granted him a decree. The defendant in the Revenue Court then brought the present suit, in which he claimed that he was entitled to a certain occupancy holding and for possession if he was found not to be in possession. There are other claims which may be disregarded for the purpose of our present judgment. Both the Courts below dismissed the plaintiff's claim, on the ground that the suit was not maintainable. It was contended that the decision of the Revenue Court operated as *res judicata* and that in any event the present suit was one which could not be maintained in a Civil Court.

On second appeal a learned Judge of this Court held with some reluctance that having regard to the rulings of this Court, the decision of the Court below was wrong and he accordingly allowed the appeal and remanded the suit for disposal on the merits. It seems to us that the decision of the learned Judge of this Court was correct.

The plaintiff in the present suit does not allege the existence of the relationship of landlord and tenant between himself and the defendant. His claim is that he is the owner of a certain occupancy tenancy and that the defendant is a trespasser. True it is that if the plaintiff in the present suit is successful, the decision in his favour will be inconsistent with the decision of the Revenue Court in favour of the defendant. It seems to us, however, quite clear that the decision of the Revenue Court cannot be relied upon as *res judicata*, because the Revenue Court was not competent to try the present suit. If the decision of the Revenue Court cannot be successfully pleaded as *res judicata*, then that decision does not render the present suit unmaintainable.

It is next contended that the existing relation between the plaintiff and defendant is one of the matters which could be decided under Section 95 of the *Tenancy Act*. In our opinion this section deals with questions arising between landlord and tenant and not between rival claimants to a tenancy. We have already decided the

very point in the case of *Jagar Nath v. Ajudhya Singh* (1).

The decision in the case of *Dewan Singh v. Ran'hera* (2) is relied upon by the appellant. The learned Judge in that case seems to have been of opinion that the question of title to an occupancy holding arising between rival claimants could be dealt with by the Revenue Court under Section 95 of the Tenancy Act. The attention of the learned Judge does not appear to have been drawn to the decision in *Jagar Nath v. Ajudhya Singh* (1) and it is certainly inconsistent with it. We dismiss the appeal, but without costs as no one appears for the other side.

Appeal dismissed.

(1) [1912] 17 I.C. 376=35 All. 14.

(2) A.I.R. 1914 All. 460=26 I.C. 718.

A. I. R. 1915 Allahabad 50

TUDBALL, J.

Mohammad—Applicant

v.

Ali Raza—Opposite party.

Criminal Revn. No. 1139 of 1914, decided on 18th December 1914.

(a) *Criminal P. C. (5 of 1898), S. 403—Complaint under Ss. 420 & 409, I. P. C. can be re-instituted if dismissed on complainant's wish—Penal Code, Ss. 409, 420.*

A complaint under Section 420, 409, Indian Penal Code, dismissed on the complainant's statement that he had come to terms with the accused and did not wish to offer any evidence, can be re-instituted in the Court of another Magistrate who has jurisdiction to entertain it.

[P. 50, C. 2.]

(b) *Criminal P. C. (5 of 1898), S. 526—Evidence oral and documentary in English before Magistrate not knowing English is good ground for transfer.*

Where in a case there is a good deal of evidence (both oral and documentary) in English and the Magistrate in whose Court the case is pending does not know English, it may be necessary and perhaps advisable to transfer the case to some Magistrate who knows that language.

[P. 50, C. 2.]

Nihal Chand—for Applicant.

W. Wallach—for Opposite party.

Judgment.—Mirza Ali Raza, the opposite party to this application, on the 30th of June 1913, made a complaint against Syed Mohammad, the applicant in the Court of Qazi Ibrar Ahmad, a Magistrate of the first Class, charging him with offences under Sections 420 and 409 of the Code. The complainant in the case brought about the transfer of the trial from the Court of that Magistrate to the Court of another Magistrate of the first Class, Rai

Bahadur Radha Raman. The ground for the transfer was that a good deal of the evidence in the case was English correspondence and also the probability that English witnesses might be examined. It is not clear by whom the order of transfer was passed but presumably it was by the District Magistrate. On the 9th of September 1913, when the case was called in the Court of Rai Bahadur Radha Raman the complainant said that he had come to terms with the accused and did not wish to offer any evidence and so the Magistrate discharged the latter. A fresh complaint has now been made in the Court of Qazi Ibrar Ahmad and the Magistrate has taken cognizance of the complaint. The present application is directed against these proceedings and it is prayed that they may be quashed and the complaint dismissed on the ground that the Magistrate had no jurisdiction to sit in judgment over the decision of the District Magistrate, as a Magistrate of co-ordinate jurisdiction cannot re-open the case. There appears to have been an error in the application. There is nothing to show that Rai Bahadur Radha Raman was ever the District Magistrate of Moradabad, and the history of services shows that from the commencement of 1913 to the 18th of November 1913 he was a first Class Magistrate and not a District Magistrate. He is no longer attached to the District. So far as the facts are stated before me the only Magistrate who had jurisdiction in the matter or could now have jurisdiction therein is the one in whose Court the complaint has been laid afresh. The Court of Rai Bahadur Radha Raman merely had jurisdiction in this case by reason of the order of transfer and that case having come to an end in his Court and he having left the District there is no other Court except that of Qazi Ibrar Ahmad to take cognizance of the complaint. Therefore it is impossible for me to pass any order quashing the proceedings and dismissing the complaint; nor would it be right to put a stop to the proceedings. If, as the case appears to be, there be a good deal of evidence in English both oral and documentary and as the Magistrate in whose Court the case is pending does not know English, it may be necessary and perhaps would be advisable to transfer the case to the Court of some Magistrate who know that language. But it is unnecessary for

me to pass any order in respect thereof, as it is open to the parties, both of whom express their agreement to a transfer and to apply to the District Magistrate for an order in that respect. The present application is rejected.

Application rejected.

A. I. R. 1915 Allahabad 51 (1)

RICHARDS, C. J. AND TUDBALL, J.

Indraj—Plaintiff—Appellant

v.

Brother Clement—Defendant—Respondent.

Second Appeal No. 53 of 1915, decided on 9th February 1915, from the decision of the Dist. J., Meerut, dated 22nd September 1914.

Pre-emption—Inadequate offer by co-sharer is tantamount to refusal to purchase—(semble) Vendor's duty to act bona fide and give fair opportunity to co-sharer.

Where in pursuance of the custom of pre-emption providing that a co-sharer wishing to sell must first offer the property to his co-sharers, the vendor offered the property to the plaintiff his co-sharer, who offered only Rs. 160 and refused to give more, and then sold the property to the vendee for Rs. 235.

Held, that under the circumstances the conduct of the plaintiff amounted to a refusal to purchase the property when it was offered to him. [P. 51, C. 1.]

Semble—In a case where the custom of pre-emption exists the vendor must act *bona fide*, and the pre-emptor must have a fair opportunity of purchasing the property. [P. 51, C. 2.]

S. N. Sen—for Appellant.

Judgment.—This appeal arises out of a suit for pre-emption. The alleged custom is that the co-sharer wishing to sell must first offer the property to his co-sharers. In the present case the Court below has found that the vendor, wishing to sell, first offered the property to the plaintiff and that the plaintiff offered only Rs. 160 and "*refused to give more.*" The vendor then went to the vendee and sold the property for Rs. 235. The Court below has found under these circumstances that the plaintiff refused to purchase the property and on that ground dismissed the suit. If this finding is justified it concludes the appeal. It seems to us that the Court below was not only justified but was perfectly right in holding that the conduct of the plaintiff amounted to a refusal to purchase the property when it was offered to him.

The vendor was entitled to assume that

the plaintiff would not give Rs. 235 when he had refused to give more than Rs. 160.

Reliance is placed upon the case of *Kanhai Lal v. Kalka Prasad* (1). In that case no doubt the Court held that the vendor was bound when he had concluded a definite arrangement with a stranger to offer the property to the person entitled to pre-empt, although he had previously refused to purchase. It does not appear very clearly from the report what was the custom found to exist. We think it can hardly be contended that where the custom is that the first offer must be made to the co-sharers the vendor must, after offering the property to the co-sharers, find a stranger willing to buy, conclude a bargain with him, and then return to his co-sharers and offer the property to them. Surely in a case like the present the vendor has complied with the custom, if he has informed the pre-emptor of his desire to sell and ascertained from him either that he does not wish to buy or the price beyond which he is not willing to go. It would almost seem that a custom which required the vendor to do more than this would be an unreasonable custom. Of course the vendor must give clear information of his intention to sell and we are very far from saying that if the pre-emptor expressed his willingness to purchase at a specific price the vendor would be justified in selling the property for practically the same price to a stranger without first informing the pre-emptor. In other words, the vendor must act *bona fide* and the pre-emptor must have a fair opportunity of purchasing the property. Under the circumstances of the present case we think the view taken by the Court below was correct, and dismiss the appeal.

Appeal dismissed.

(1) (1905) 27 All. 670=2 A. L. J. 390=1905 A. W.N. 149.

A. I. R. 1915 Allahabad 51 (2)

PIGGOTT, J.

Baldeo Shukul—Defendant—Appellant

v.

Balbhadar Singh—Plaintiff—Respondent.

Second Appeal No. 1384 of 1913, decided on 20th July 1914, from the decision of the Sub-J., Jaunpur, dated 23rd September 1913.

(a) *Malicious prosecution—Defendant need not be prosecutor—It is sufficient if prosecution was at defendant's instance—Arrest by defendant himself involved great responsibility.*

In order to succeed in a suit for damages for malicious prosecution, it is not necessary for the plaintiff to prove that the defendant was in fact his prosecutor in the proceedings before the Criminal Court. [P. 53, C. 1.]

The plaintiff was proceeding from the Jaunpur Railway Station to his home when the defendant ran up from behind and arrested him. The plaintiff was eventually put upon his trial on a charge of theft but was acquitted. On plaintiff's suit for damages for malicious prosecution :

Held, (1) that in taking upon himself to arrest the plaintiff, the defendant took upon himself a responsibility far greater than he would have done if he had merely made a report or complaint alleging the commission of an offence of theft before an authority competent to take action in the matter ; [P. 53, C. 1.]

(2) that the prosecution of the plaintiff before the Criminal Court was substantially the work of the defendant and that he was, therefore, liable for damages. [P. 53, C. 1.]

(b) *Malicious prosecution—Damages for mental distress and bodily discomfort owing to arrest and detention in the lock-up are awardable.*

(3) plaintiff is entitled to claim damages for his mental distress and bodily discomfort resulting from his arrest and detention in the lock-up. [P. 53, C. 2.]

Haribans Sahai—for Appellant.

Jang Bahadur Lal for *Satish Chandra Banerji*—for Respondent.

Judgment.—Baldeo Shukul, who is the defendant-appellant in this case, was a watchman employed by the Bengal and North-Western Railway Company at their railway station at Jaunpur. He has been sued for damages by the plaintiff, Balbhadar Singh, upon the following allegations :—That in the middle of the night between the 15th and the 16th day of January, 1912, Balbhadar Singh, travelling upon his own private affairs, alighted at the railway station abovementioned and was proceeding from thence to his home. He had gone a short distance from the railway station when the defendant, Baldeo, ran up to him from behind, caught hold of him and raised an alarm of thieves. Another watchman was summoned and the person of the plaintiff was secured. He was then taken before the goods clerk at the railway station, to whom the defendant, Baldeo, accused him of having been caught in the act of stealing a sack of grain from the shed where the defendant was employed as a watchman. Through

the goods clerk, the plaintiff was made over to the Police and eventually put upon his trial on a charge of theft. The plaintiff contended further that the defendant, Baldeo, not merely gave false evidence against the plaintiff before the Criminal Court, but also looked after the case and assisted the police in its prosecution. Finally, it is alleged that all these proceedings on the part of the defendant were taken maliciously on account of previously existing enmity between the parties. In the Courts below the suit was treated as one for damages for malicious prosecution, pure and simple. The Courts laid upon the plaintiff the full burden of proof which lies upon a plaintiff in such a case. They seem to me to have considered the case with due regard to the principles laid down by their Lordships of the Privy Council in the case of *Gaya Prasad v. Bhagat Singh* (1). They have found against the defendant and in favour of the plaintiff on every possible point raised by the pleadings, and have decreed the suit, as brought. The defendant, coming to this Court in second appeal, has tendered a memorandum of appeal in which there are six paragraphs. One of these was withdrawn before the appeal was admitted. Another merely asserts a perfectly correct proposition of law, *viz.*, that the evidence given in the criminal case which resulted in the acquittal of the plaintiff, Balbhadar Singh, could not be treated as an evidence in the present suit. As it has not been shown to me that this principle of law was in any way violated by the Courts below I may pass over this plea.

The remaining paragraphs of the memorandum of appeal raise in substance three pleas :—(1) that inasmuch as the defendant, Baldeo Shukul, neither made any report to the Police or complaint to a Magistrate against the plaintiff, Balbhadar Singh, it cannot be said that he was the prosecutor in this case, or that he is liable for damages for malicious prosecution ; (2) that the *onus* lay on the plaintiff to prove that there was no reasonable and probable cause for the prosecution and that the defendant was actuated by malice. The suggestion as put forward in argument is that there has been no clear finding on the point by the lower

(1) (1908) 30 All. 525 = 35 I.A. 189 (P.C.).

Appellate Court, and (3) it is contended that the amount of damages awarded is excessive and that the damages have been assessed on unsound principles of law. In dealing with this appeal as a whole I certainly feel one difficulty. It seems to me probable that the plaintiff himself was not fully aware of the strength of his legal position on the facts alleged by him, and I have no doubt that the Courts below have underestimated the strength of the plaintiff's position. It may be that the present suit was, in a certain sense and to a certain extent, a suit for damages for malicious prosecution, but it was a great deal more than that. In its essence it was a suit for damages for false imprisonment. When the defendant, Baldeo, took it upon himself to arrest the plaintiff he assumed a responsibility in law far greater, and not as the appellant to this Court would suggest considerably smaller, than he would have done if he had merely made a report or complaint alleging the commission of an offence of theft against the plaintiff before an authority competent to take action on the same. If the Courts below had dismissed the plaintiff's suit, it might have been a matter for serious consideration whether I ought not to order its re-trial, on the ground that the essential nature of the suit had been misconceived. As the case stands, however, the Courts below have simply laid upon the plaintiff a heavier burden of proof than they would have done if they had rightly appreciated his legal position, and nevertheless they have found in the plaintiff's favour. With regard, therefore, to the first of the pleas put forward by the appellant I hold, in the first instance, that it was by no means necessary for the plaintiff in order to succeed in a suit for damages upon the facts alleged in the plaint, to prove that the defendant was in fact his prosecutor in the proceedings before the Criminal Court. The nature of the suit cannot be changed because the Courts below have seen fit to label it a suit for malicious prosecution, although the allegations in the plaint show it to be this and something considerably more. I hold, further, that on the facts found by them the Courts below were entitled to infer that the prosecution of the plaintiff before the Criminal Court was substantially the work of the defendant, and that he was liable for the same in damages. As to the second question,

viz., the absence of reasonable and probable cause and the presence of malice, I am clearly of opinion that these points have been decided against the defendant by the Courts below upon evidence which justifies their decisions. The plea to the contrary is based upon detached passages quoted from the judgment of the lower Appellate Court, in which that Court was dealing expressly with the pleas as they stood in the memorandum of appeal before it. In substance the lower Appellate Court has found that there was no theft committed at the time when the plaintiff was arrested, that the plaintiff was going about his lawful business at the time, that he was arrested on account of previous enmity and that the defendant knew perfectly well when he arrested the plaintiff that he had no lawful ground for doing so. The plea as regards damages is based upon the principle, said to be deducible from certain English cases, that damages for mental anxiety only cannot be awarded in suits for slander. What the plaintiff in the present case asked the Court to compensate him for over and above his out of pocket expenses, was not merely the injury to reputation, but the distress of mind and the bodily discomfort which he suffered through having been arrested in the middle of the night, sent to the look-up and detained in custody amongst felons and bad characters for a period of almost a month and a half. In my opinion he was thoroughly entitled to claim compensation on this ground, and I see no reason to hold that the Court below has erred in accepting the moderate sum at which he assessed his sufferings. This appeal, therefore, fails and is hereby dismissed with costs including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 53

KNOX, J.

East Indian Railway Co—Defendants—Petitioners

v.

Binda—Plaintiff—Respondent.

Civil Revn. Petn. No. 113 of 1914, decided on 25th November 1914, from the decree of the Sm. C. Court Judge, Cawnpore, dated 9th March 1914.

Civil P. C. (5 of 1908), S. 20 (c)—Goods booked at Cawnpore—Suit for recovery of excess freight tenable in Cawnpore.

The plaintiff contracted with the defendant Company for carriage of grain and seed from Cawnpore to Jagganath Ghat *via* Howrah. He paid for the conveyance of several consignments certain sums of money which, he subsequently discovered, were in excess of what he should have paid. He sued for the recovery of the excess sum at Cawnpore :

Held, that the cause of action having arisen in part at Cawnpore, the Cawnpore Court had jurisdiction to entertain the suit. [P. 54, C. 2.]

Ladli Prasad Zutshi—for Petitioners.

Kailas Nath—for Respondent.

Judgment.—The suit out of which this application has arisen was brought by one Binda. Binda had contracted with the East Indian Railway Company, defendants in the Court of first instance, for the carriage of grain and seed from Cawnpore to Jagganath Ghat *via* Howrah. He paid for the conveyance of several consignments certain sums of money based upon a special rate, which was provided by the Company for the carriage of grain and seeds and which is known by the technical term of maund rate as opposed to another rate known as waggon rate. Apparently after he had paid the money, he discovered that the charge would have been lower if he had contracted with the Railway Company to carry consignments of grain at the rate known as waggon rate. He accordingly brought the present suit, asking for a refund of the amount which had been overcharged so far as a portion of the line of the defendant Railway Company was concerned. The consignments had to travel over the Railway of the defendant Company and also over the Eastern Bengal Railway. For the carriage of the consignments over that portion which belonged to the Eastern Bengal Railway he made no claim. He sued in the Court of Small Causes at Cawnpore. That Court granted him a decree in part for Rs. 165-9-6, out of the claim which had been laid at Rs. 214-1-11. It is now contended before me that the Court of Small Causes at Cawnpore had no jurisdiction to entertain this suit, and the Railway Company base this contention upon a decision of this Court in *Amolak Ram v. Bombay, Baroda & Central India Railway Company* (High Court Decisions on Indian Railway Cases by Tiruvenkata Chariar, page 477). In answer the learned Vakil who appears for Binda refers me to the

change which has taken place in Section 20 of the Code of Civil Procedure. There is no doubt that that Section is considerably changed from what it was in the former Code of Civil Procedure. The portion which concerns the present case is clause (c) of Section 20 of the present Code. In the old Code clause (a), Section 17, ran thus : "The cause of action arises." In the present Code the words now used are : "The cause of action, wholly or in part, arises." The case of *Amolak Ram v. Bombay, Baroda & Central India Railway Company* was a case decided under the Code which was in force in the year 1888. Looking to the argument and reasoning given in that judgment, I am of opinion that that case would have been differently decided if it had been a case brought under the new Code. I find that the Court at Cawnpore had jurisdiction to entertain the suit inasmuch as the cause of action, at any rate in part, had arisen in Cawnpore. This being so, the plea of want of jurisdiction fails.

With reference to the second contention that the plaintiff is not entitled to alter the contract which he originally made with the defendant company, as this is a Small Cause Court case, I am not prepared to interfere. The application is dismissed with costs.

Application dismissed.

A. I. R. 1915 Allahabad 54

CHAMIER AND PIGGOTT, JJ.

Mahabir Sahu—Opposite Party—Appellant

v.

Bhirgu Rai and others—Applicants—Respondents.

First Appeal No. 91 of 1914 and Civil Revn. No. 140 of 1914, decided on 26th January 1915, from an order of the Dist. J., Azamgarh, dated 7th March 1914.

(a) *Civil P. C. (5 of 1908), O. 21, R. 72 (3)*—No second appeal on order setting aside sale lies.

No appeal lies from an order of the Appellate Court setting aside a sale in execution.

[P. 55, C. 1.]

(b) *Civil P. C. (5 of 1908), S. 115*—Wrong decision on point of limitation cannot be interfered.

Where an appeal is competent to a District Judge from an order passed by a Court of first instance, the High Court cannot interfere in revision with the appellate order of the Judge merely because he decided a question of limitation wrongly.

[P. 55, C. 2.]

Haribans Sahai—for Appellant.

Lakshmi Narayan—for Respondent.

Facts.—A judgment-debtor whose property had been sold away at auction, applied for setting aside the sale more than 30 days after it had taken place.

The Munsif rejected the application on the ground that it had been made more than 30 days after the sale. On appeal, the District Judge set aside the sale on the ground that the decree-holder had purchased the property in the name of his son without the Court's permission. He further held that as the application was under Section 47, Civil Procedure Code, 30 days' limitation did not apply. The auction-purchaser appealed to the High Court against this order and also filed a revision petition.

APPEAL FROM ORDER NO. 91 OF 1914.

Judgment.—This is an appeal by a purchaser of property at an execution sale. According to the finding of the lower Appellate Court the decree-holder, Ram Jas Shau, purchased the property in the name of his son, the present appellant. The judgment-debtors applied to have the sale set aside on various grounds, amongst others on the ground that the decree-holder had purchased the property in the name of his son without obtaining the permission of the Court. The Munsif rejected the application. On appeal the District Judge held that the purchase was really made by the decree holder himself and finding that the property fetched a very low price, he set aside the sale. As the order was clearly one passed under Order XXI, Rule 72, Clause (3), an appeal lay to the District Judge under Order XLIII, Rule 1 (j), but a further appeal to this Court is clearly barred by Section 104, Sub-Section 2, of the Code. This appeal, therefore, fails and is dismissed with costs.

CIVIL REVISION NO. 140 OF 1914.

This application for revision was presented along with first appeal from Order No. 91 of 1914, which we have disposed of to-day. We have held that the present applicant had no right of appeal to this Court against the order of the District Judge. The applicant anticipating this decision filed this application for revision of the same order. In support of this application it is contended that the District Judge had no jurisdiction to set aside the

sale because before the application of the judgment-debtors to have the sale set aside was made the sale had been confirmed and because the application having been made more than thirty days after the date of the sale, was barred by limitation under Article 166 of the first Schedule to the Limitation Act. The learned District Judge does not in so many words say so, but it seems to us probable that he treated the case as being covered by Section 18 of the Limitation Act, as the judgment-debtors in this application to have the sale set aside said that the decree-holder had purchased the property without the knowledge of the judgment-debtors. Whether this was the view of the learned Judge or not matters little. He may have been wrong in holding that the judgment-debtors application was within time; but we cannot interfere in revision with his order merely because he decided the question of limitation wrongly. It is quite clear that he had jurisdiction to entertain the appeal and dispose of the matter before him. This application fails and is dismissed with costs.

Appeal and application both dismissed.

A. I. R. 1915 Allahabad 55

RICHARDS, C. J. AND BANERJI, J.

Suraj Mal—Plaintiff—Appellant

v.

Hira Kunwar—Defendant—Respondent.

Second Appeal No. 32 of 1914, decided on 21st November 1914, from the decision of the Dist. J., Aligarh.

Agra Tenancy Act (2 of 1901), S. 199—Revenue Court's order to establish claim on lease in Civil Court within 3 months—Suit after 3 months—Suit held tenable as the order did cast cloud on title.

In a suit for ejectment in the Revenue Court the defendant pleaded that he was holding the land under a lease the term of which had not yet expired. The Revenue Court directed the defendant to institute a suit in the Civil Court within three months to establish his rights under the lease. The suit was instituted after the expiration of three months.

Held, that as a cloud was cast on the plaintiff's title under his lease he was entitled to institute the present suit notwithstanding that the period prescribed in the order of the Revenue Court had expired. [P. 56, C. 1 & 2.]

Gulzari Lal—for Appellant.

S. C. Banerjee—for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff sought a declaration that he was entitled to remain in possession of certain property under an alleged *zar-i-peshgi* lease, dated the 9th September 1904. It appears that the document in question is executed by one Lala Behari Lal, the father of the plaintiff, in favour of his son. *Mussammatt* Hira Kunwar, the defendant, was one of the co-sharers. Partition proceedings were brought in the Revenue Court and the portion of property alleged to have been leased fell to the lot of *Mussammatt* Hira Kunwar. Thereupon she instituted a suit in the Revenue Court for possession of the plots that had so fallen to her lot and for ejectment of the plaintiff. The plaintiff set up the document of the 9th of September 1904. The Revenue Court, thinking that it was a case to which Section 199 of the Agra Tenancy Act applied, directed Suraj Mal to institute a suit in the Civil Court within three months to establish his rights under the lease. Suraj Mal did not institute a suit within the three months prescribed. Both Courts have dismissed the suit on the ground of limitation, holding that the suit ought to have been instituted within the three months mentioned in the order of the Revenue Court. Hence the present appeal.

It seems to us open to some doubt whether *Mussammatt* Hira Kunwar was entitled to institute her suit in the Revenue Court for ejectment. Her case appears to be that the lease of the 9th of September 1904 was a fraudulent lease made by the *lambardar* in favour of his own son. If this be her case and if it be found to be correct, then Suraj Mal would be a trespasser. It seems to us also that the decision of the Courts below was not correct. It is quite clear that no question of "proprietary" title was raised in the Revenue Court. The plaintiff in that Court sued for possession of certain plots and Suraj Mal set up the plea that she was not entitled to possession, because a lease had been made in his favour by the *lambardar*. If the suit was properly instituted in the Revenue Court, then the Revenue Court might have decided the question of the validity or the invalidity of the lease itself. But it seems to us that a cloud having been cast on Suraj Mal's title under his

lease, he was entitled to institute the present suit notwithstanding that the period prescribed in the order of the Revenue Court had expired. We particularly wish to state that we are not expressing any opinion on the question of the validity or invalidity of the lease. This is a matter which must be tried. We accordingly allow the appeal, set aside the decrees of both the Courts below and remand the case to the Court of first instance, through the lower Appellate Court, with directions to re-admit the case under its original number in the file and proceed to hear and determine the same according to law. We direct that the Court below take up the case as soon as possible. Costs here and heretofore will be costs in the cause.

Appeal allowed : Case remanded.

A. I. R 1915 Allahabad 56

CHAMBER AND PIGGOTT, JJ.

Ras Behari Lal — Plaintiff—Appellant

v.

Akhai Kunwar and others — Defendants—Respondents.

Second Appeal No. 1250 of 1913, decided on 20th November 1914, from the decision of the Dist. J., Ghazipur, dated 20th August 1913.

Easement Act (5 of 1882), Ss. 59 and 60—Licensor's transferee cannot revoke license when expensive and permanent works executed.

The transferee of a licensor cannot revoke the license where the licensee acting upon the license has executed a work of a permanent character and incurred expenses in the execution.

[P. 57, C. 2.]

Tej Bahadur Sapru and Purushottam Das—for Appellant.

B. E. O'Connor—for Respondents.

Judgment.—The facts of this case are that in the year 1888 one Jhingur Singh made over to the first defendant, in consideration of medical services rendered by him, some plots of land in a village. The defendant entered into possession, planted a garden and built houses on the land laying out a considerable sum of money thereon. In 1906 Jhingur Singh sold his rights in the village to the plaintiff-appellant, who at once set to work to compel the first defendant to pay rent for the

land. All his attempts in the Revenue Court failed and he then brought this suit praying for proprietary possession of the land and for mesne profits for the three years immediately preceding the suit. The defence was that the plots in question were given by the *zemindar* to the defendant in recognition of his medical services, that the defendant had spent a large sum of money on the land and that the plaintiff had no right to dispossess him. The Courts below have agreed in dismissing the plaintiff's claim. In second appeal it is contended on behalf of the plaintiff that in the absence of a registered document, the defendant is no more than a licensee and that the plaintiff being a transferee of the property is entitled to revoke the license. Reliance is placed on Section 59 of the Easements Act, which runs as follows :—

"When the grantor of a license transfers the property affected thereby the transferee is not as such bound by the license."

The defendant, on the other hand, relies on Section 60 of the Act which so far as it applies to the present case, is as follows :—

"A license may be revoked by the grantor, unless the licensee, acting upon the license, has executed a work of a permanent character and incurred expenses in the execution." The plaintiff admits that on the facts found the case is clearly covered by Section 60 of the Act, but he maintains that Section 59 lays down an independent rule, which entitles a transferee of property to revoke a license even if the licensee acting upon the license has executed a work of a permanent character and incurred expenses in the execution, that is to say, even if the license could not have been revoked by the original grantor. It seems to us that the words "as such" in section 59 are extremely significant and would not have appeared in the section if the intention had been to lay down an independent rule that a transferee of property might revoke a license which could not have been revoked by the transferor. The section was probably inserted in order to meet the possibility of a plea by the licensee of property that no one but the grantor of a license is entitled to revoke it, and that if the grantor does not choose to revoke it his transferee cannot do so. In our opinion Section 59 means that when the grantor of a

license transfers the property, the transferee is no more bound by the license than the transferor was and, we think, it is impossible to construe this section as meaning that the transferee has a better right than the transferor. For these reasons we are of opinion that Section 59 of the Easements Act does not entitle the plaintiff to revoke the license granted to the defendant even if he is only a licensee. We need only add that the plaintiff's claim against the defendant as a trespasser is clearly not maintainable. The suit was rightly dismissed and we dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 57

TUDBALL AND RAFIQUE, JJ.

Rang Lal Kuar and others—Judgment-debtors—Appellants

v.

Kishori Lal and others—Decree-holders—Respondents.

Ex. Second Appeal No. 1002 of 1914, decided on 17th February 1915, from the decision of the Dist. J., Ghazipur.

Agra Tenancy Act (2 of 1901), S. 21 (2)—S. 21 (2) is not retrospective—Possession under decree on mortgage executed before the Act can be recovered.

Where a decree for possession of an occupancy holding was passed in 1912 in favour of the mortgagee on foot of a usufructuary mortgage executed prior to the passing of the Agra Tenancy Act, 1901, the Court was bound to execute the decree and the mortgagee decree-holder was entitled to possession under it. 3 A. L. J. 40 and 12 I. C. 631 Ref. [P. 58, C. 1].

M. L. Agarwala—for Appellant.

Damodar Das—for Respondents.

Judgment.—This is a second appeal by the judgment debtors. An occupancy holding was usufructuarily mortgaged on January 25th, 1900, to one Dwarka Prasad whose interest has now devolved upon the present decree-holders, Kishori Lal, etc. Possession was not given to the mortgagee, who brought a suit in which he sought in the alternative either to recover his money or get possession of the property. On June 6th, 1912, a decree for possession was awarded to the mortgagee as such. An objection was taken in the course of the suit by the defendants that the transfer was illegal and that the plaintiffs were not entitled to possession. The Court decided in favour of the mortgagee, holding that mortgage was valid and that the plaintiffs as such were entitled to possession.

sion and accordingly it gave a decree for possession. Having obtained the decree execution was sought and again the judgment debtors came forward and pleaded that possession could not be given to the decree-holders in execution of the decree by reason of Section 20 of the Tenancy Act. The Subordinate Judge allowed this plea and dismissed the application. The lower Appellate Court has set aside the decision of the first Court and has ordered possession to be delivered to the decree-holders in execution of the decree. The Judgment-debtors come here in second appeal and it is urged that whatever may have been decreed, still clause 2 of Section 21 says clearly that the interest of an occupancy tenant is not transferable in execution of a decree of the Civil Court and, therefore, the Civil Court's decree cannot be executed. In view of the decision of this Court in the case of *Babu Lal v. Ram Kali* (1) and in *Harbans Rai v. Srinivas Rao Kalin* (2), the plea has absolutely no force at all. It has been decided as between the parties finally in the course of this suit that the plaintiffs are entitled to possession. The decree has been obtained. Under the rulings of this Court the mortgage, which was made before the present Tenancy Act came into force, was a good one and the mortgagee was, therefore, entitled to enforce his decree. Over and above this the executing Court cannot go behind the decree. That decree states that the plaintiff shall be put into possession and the Court is bound to execute it. There is no force in the appeal. We dismiss it with costs.

Appeal dismissed.

- (1) (1906) 3 A. L. J. 40=(1906) A. W. N. 28.
(2) (1911) 12 I. C. 631.

A. I. R. 1915 Allahabad 58

RICHARDS, C. J. AND BANERJI, J.

Daya Shankar — Defendant — Appellant

v.

Hub Lal and another—Plaintiffs—Respondents.

Second Appeal No. 82 of 1914, decided on 26th November 1914, from the decision of the Dist. J., Aligarh.

(a) *Hindu Law—Manager—Transaction by, is binding in absence of fraud or collusion.*

Under ordinary circumstances and in the absence of fraud or collusion, the managing member of a joint Hindu family is entitled to

transact the business of the joint family and represent the members of it. [P. 58, C. 2.]

(b) *Registration Act* (16 of 1908), S. 17—*Family settlement about immovable property does not require registration.*

A family settlement come to in a mutation proceeding and creating rights in immovable property does not require registration. 21 I. C. 29 Foll. [P. 58, C. 2. & P. 59, C. 1.]

Gulzari Lal—for Appellant.

Girdharilal Agarwala—for Respondents.

Judgment.—This appeal arises out of a suit in which the plaintiffs sought a declaration that they were the owners and possessors of certain property and possession.

It appears that the parties who are disputing about the estate of one Bhajan Lal were all members of the same family. In mutation proceedings a family settlement was come to, in consequence of which the plaintiffs were recorded as owners in respect of the property now in suit. It is alleged by the plaintiffs that this arrangement was come to as the result of fraud. The Court of first instance found that there was no fraud when the family settlement was entered into, and accordingly the plaintiffs were not entitled to a decree.

The lower Appellate Court agreed in all the findings of fact of the Court of first instance, but finding that one of the plaintiffs was a minor, it decreed the claim to the extent of the interest to which he would have been entitled had there been no family arrangement. The defendant comes here in second appeal contending that inasmuch as the father of the minor Raj Narain consented to the arrangement it is binding upon his son, who is a member of the joint Hindu family. In our opinion under ordinary circumstances and in the absence of fraud or collusion, the managing member of a joint Hindu family is entitled to transact the business of the joint Hindu family and represent the members of it.

In the present case no fraud or misconduct of any kind on the part of the father is proved, and it is not shown that the arrangement taken as a whole was not for the benefit of the family. On this point therefore, we think that the lower Appellate Court was wrong.

The respondent, however, seeks to uphold the decree of the Court below, on the ground that rights in immoveable property were created by the compromise entered into between the parties, and that this could only be done by a document duly

registered. We think that under the circumstances of the present case it was not necessary that there could have been any registered writing. The case is very similar to the case of *Kokla v. Peary Lal* (1). This case was followed in the case of *Jagrani Misrani v. Bisheshar Dube* (2), to which one of us was a party.

We accordingly allow the appeal, set aside the decree of the lower Appellate Court, and restore the decree of the Court of first instance with costs.

Appeal allowed

(1) (1913) 21 I. C. 29 = 35 All. 502.

(2) A. I. R. 1914 All. 464 = 26 I. C. 791.

A. I. R. 1915 Allahabad 59

TUDBALL AND RAFIQUE, JJ.

Chhabila Ram and another—Plaintiffs
—Appellants

v.

Durga Prasad and others — Defendants—Respondents.

First Appeal No. 290 of 1913, decided on 10th March 1915, from the decision of the Dist. J., Mainpuri, dated 18th February 1913.

Civil P. C. (5 of 1908), S. 92—*One of the two plaintiffs dying, any member of the public interested in the trust after obtaining sanction can join the suit—Court must give opportunity to obtain sanction and to show interest in trust.*

Section 92 of the Civil Procedure Code, 1908, is not mandatory but is permissive and directory. A suit under Section 92, Civil Procedure Code, brought by two persons is brought by them in their representative capacity as members of the public interested in the trust in question. It is necessary for the continuance of the suit that there should be at least two plaintiffs. If one representative dies it is open to another member of the public interested in the trust to come forward to take his place and thus to prevent the suit abating. He should also obtain the necessary sanction. [P. 59, C. 2]

Two persons B and C, with the permission of the Legal Remembrancer, brought a suit of the nature contemplated in Section 92 of the Civil Procedure Code against D. During the pendency of the suit B died. K applied to be brought on the record. The Court dismissed the suit as K was not the legal representative of B.

Held, that the court ought to have given K an opportunity *first* of obtaining sanction from the Legal Remembrancer and *secondly* of showing that he was a person interested in the trust and on proof of these two qualifications the Court ought in the interest of the public to have made K a co-plaintiff in the suit. [P. 59, C. 2 & P. 60, C. 1]

S. N. Sen—for Appellants.

Lakshmi Narain—for Respondents.

Judgment.—This appeal arises out of a suit brought by two persons under the conditions mentioned in Section 92 of the

Code of Civil Procedure. These two persons were, Chhabila Ram and Bhagwan Das. They obtained the sanction of the Legal Remembrancer and instituted the suit. The trustee against whom they sued was Baboo Durga Prasad, the present respondent in this appeal. While the suit was pending Bhagwan Das died. One Mohunt Kanhaya Lal applied to the Court to have his name brought on the record as co-plaintiff in place of that of Bhagwan Das, claiming to be the heir and legal representative of the deceased. Apparently Kanhaya Lal was not related in any way and could not have been deemed to be the heir and legal representative of Bhagwan Das in his personal capacity. The Court refused the application and dismissed the suit, as it was no longer maintainable by one plaintiff. The judgment shows clearly that the question of Kanhaya Lal's obtaining sanction from the Legal Remembrancer was before the Court. That Court was of opinion that the defect in the suit could not be cured by allowing Kanhaya Lal time to apply for sanction. It, therefore, dismissed the suit. It is quite clear that a suit of this nature brought by two persons is brought by them in their representative capacity as members of the public interested in the trust. It has been held that Section 92 is not mandatory, but is permissive and directory. It seems to us also to be clear that, when a suit is brought by two or more persons under the conditions mentioned in Section 92 for the continuance of the suit it is necessary that there should be at least two plaintiffs, *i.e.*, two persons interested in the trust and holding the sanction of the Advocate-General or, in these provinces, of the Legal Remembrancer, in order to enable them to carry on the litigation. It is clear that if one representative dies it is open to another member of the public interested in the trust to come forward to take his place and thus to prevent the suit abating. It is also necessary that this other member of the public thus interested should obtain the sanction of the Advocate-General or the Legal Remembrancer. The suit being one which had been brought with sanction and it being a matter of a public trust, the lower Court ought, in our opinion, to have given Kanhaya Lal an opportunity, *first*, of obtaining sanction from the Legal Remembrancer and *secondly*, of showing that he was a person interested in the

trust and on proof of these two qualifications the Court ought in the interest of the public to have made Kanhaya Lal a co-plaintiff in order to enable the suit to be carried on, provided no good cause was shown by the other side against his being allowed to represent the public interest in the trust. The rulings quoted by the Court below, viz., *Gopal Dei v. Kanno Dei* (1), *Abdul Rahman v. Kassum Ebrahim* (2), are totally beyond the question and have no weight in the decision of the matter. We accordingly allow the appeal. We set aside the decree of the Court below and we remand the case to the Court below with directions to re-admit it on its original number and to proceed to hear and determine the same in view of the directions given above. The costs of this appeal including fees on the higher scale will be costs in the cause and will abide the result.

Appeal decreed.

(1) (1903) 26 All. 162=1903 A.W.N. 227.

(2) (1911) 11 L.C. 726=36 Bom. 168.

A. I. R. 1915 Allahabad 60

RAFIQUE, J.

Indar Mal—Plaintiff—Applicant

v.

Budha and another — Defendants—Respondents.

Civil Revn. Petn. No. 59 of 1914, decided on 21st November 1914, from the order of the Dist. J., Agra.

(a) *Civil P. C. (5 of 1908), S. 115—Judge in misapprehending nature of suit and provisions of Art. 29 of Small Cause Courts Act commits material irregularity—Revision lies.*

A Judge acts with material irregularity if he misapprehends the nature of the plaintiff's claim and the provisions of Article 29 of Act IX of 1887, and in such a case the High Court has jurisdiction to entertain an application for revision.

[P. 60, C. 2 & P. 61, C.1.]

(b) *Provincial Small Cause Courts Act (9 of 1887), Sch. 2, Art. 29—Suit for accounts alleging dissolution or alternatively praying for dissolution is not cognizable by Small Cause Court.*

A suit for partnership accounts with an allegation that the partnership has been dissolved and containing also an alternative prayer for the dissolution of the partnership if it has not been dissolved, is triable by a Munsif and not by a Small Cause Court.

[P. 61, C. 2]

M. L. Agarwala—for Applicant.

S. K. Dar—for Respondents.

Judgment.—This is an application in revision under Section 115 of the Civil Procedure Code. The facts which have led to the making of this application are as follows :—

The plaintiff-applicant filed a suit in the Court of the Judge of Small Causes at Agra for the recovery of Rs. 177-9-7 on partnership account. The plaint was returned by the learned Judge of Small Cause Court for presentation to proper Court, on the ground that under Article 29, clause (b), of Act IX of 1887 such a suit was not maintainable in his Court. The plaint was then presented by the plaintiff-applicant to the Munsif of Agra. One of the pleas urged by the defendants in their written statement was that the plaintiff should sue for dissolution of partnership. The plaintiff amended his plaint by adding a paragraph to it to the effect that partnership between him and the defendants had been dissolved on the 15th of March 1910, and asked for an additional relief, namely, that in case the Court found that the partnership had not been dissolved, a decree for dissolution of partnership be passed. After amendment of the plaint the Munsif rejected it, holding that he had no jurisdiction to entertain the suit as it was cognizable by a Court of Small Causes. On appeal the learned District Judge agreed with the first Court and upheld its order. The plaintiff has come up in revision under Section 115 of the Civil Procedure Code and contends that the Munsif had jurisdiction to entertain the suit.

A preliminary objection is taken on behalf of the respondents to the effect that no revision lies. It is said that the learned District Judge had jurisdiction to entertain and hear the appeal and the mere fact that he came to an erroneous decision according to the plaintiff-applicant, does not entitle the latter to come up in revision here. I do not think that the objection of the respondents is sound. The want of jurisdiction is not the only ground upon which an aggrieved party may apply for revision. The plaintiff-applicant does not deny that the learned Judge had jurisdiction to entertain and hear the appeal, but says that he exercised his jurisdiction with material irregularity inasmuch as he misapprehended the nature of the plaintiff's claim and the provisions of Article 29 of Act IX of 1887.

I have read the plaint carefully and it appears to me that the amendment made by the plaintiff in the Court of the Munsif did not render the claim exclusively triable by the Small Cause Court or oust

the jurisdiction of the Munsif. It is true that the amended paragraph of the plaint contains the allegation of the dissolution of partnership on a certain date, but it is nowhere stated that a balance of partnership accounts was struck by the parties or their agents on or after the dissolution of partnership. The claim still remains for an account of partnership transactions, or for dissolution of partnership and for an account of partnership transactions. In either case the claim is one which should be heard by a regular Court, and not by a Small Cause Court. The learned Judge seems to have taken the claim to be for the balance of partnership accounts which has been struck by the parties or their agents, as mentioned in Article 29 (c) of Act IX of 1887. The language of the plaint shows clearly that the claim was not for the recovery of the balance of partnership accounts struck by the parties or their agents. In my opinion the suit of the plaintiff is within the jurisdiction of the Munsif and should be entertained by him. As the order of the learned Judge was made under a misapprehension of the nature of the claim of the plaintiff-applicant it is liable to revision. The preliminary objection for the respondents fails and the application is allowed. The order of the Court below is set aside and the Munsif will receive the plaint and try the case according to law. Costs of this application are allowed to the applicant.

Application allowed.

A. I. R. 1915 Allahabad 61

CHAMIER AND PIGGOTT, JJ.

Anupa Kuer — Decree-holder — Applicant

v.

Achchahar Singh and others—Judgment debtors—Opposite party.

Civil Misc. Case No. 397 of 1914, decided on 23rd November 1914, on reference made by the Offg. Dist. Officer, Benares, on 13th June 1914.

Decree—Construction—Revenue Court's decree on award entitling maintenance executable by taking proceedings is declaratory.

A decree passed by a Revenue Court in accordance with an award entitled a woman to receive a fixed sum as maintenance in half-yearly instalments and provided that if the maintenance was not paid, she might enforce its payment by taking proceedings in a competent Court :

Held, that the decree was merely a declaratory decree as to the right to receive maintenance, and could be enforced by a suit in the Civil Court, and not by an application for execution of the decree. [P, 61, C, 2.]

S. N. Sen—for Applicant.

Gokul Prasad—for Opposite party.

Order.—A suit for ejectment brought by Achchahar Singh and others against Anupa Kuer in a Revenue Court came up to this Court in second appeal and was settled in accordance with an arbitration award. The award provided that a decree for possession of the land should be passed in favour of Achchahar Singh and others and that Anupa Kuer should receive from Achchahar Singh and others 11 maunds odd of grain and Rs. 14 in cash by way of maintenance to be paid in half yearly instalments. Anupa Kuer has now applied to the Revenue Court to execute so much of the decree mentioned above as relates to the maintenance payable to her. The Revenue Court, being doubtful whether it has jurisdiction to entertain this application, has referred this case to this Court under Section 195 of the Tenancy Act. The award which is incorporated in the decree of this Court provides that if the maintenance due to Anupa Kuer is not paid she may enforce payment by taking proceedings in a competent Court (*ba charajoi adalat majaz hasb-i-zabita*). It seems to us that the persons who drew up the award knew that there would be difficulty in executing a decree for maintenance in a Revenue Court and, therefore, instead of providing that enforcement of the decree should be by proceedings in the execution department, they provided that Anupa Kuer should take proceedings in a competent Court. We regard this portion of the decree as merely declaratory of Anupa Kuer's right to receive maintenance. In our opinion she should bring a regular suit in the Civil Court to enforce her right to maintenance. Section 195, subsection (3), of the Tenancy Act provides : "On any such reference being made, the High Court may order the Court either to proceed with the case, or to return the plaint, application or appeal for presentation to such other Court as it may declare to be competent to try the same." It seems to us that we should not take either of these courses. In our opinion the application for execution should be dis-

missed. With this expression of opinion we direct that the papers be returned to the Court which has made this reference.

Papers returned.

A. I. R. 1915 Allahabad 62 (1)

CHAMIER, J.

Badri Das and others—Applicants

v.

Sheo Nath Singh—Respondent.

Civil Revn. Petn. No. 176 of 1914, decided on 26th February 1915, from an order of the Small Cause Court J., Cawnpore.

Provincial Insolvency Act (3 of 1907), S. 13—Execution sale proceeds realized before adjudication do not vest in receiver.

Where the sale-proceeds in execution of a decree are realized before the judgment-debtor is adjudicated insolvent, the *interim* Receiver has no claim to such proceeds. [P. 62, C. 1]

Uma Shankar Bajpai—for Applicants.

Judgment.—The applicants obtained a decree against the respondent, Sheo Nath, in the Court of Small Causes, in execution of which they brought certain property to sale on July 16th, 1914. An order was made that the proceeds of the sale should be paid to the decree-holders, less the costs of the sale. One month before this the judgment-debtor had applied to be declared insolvent, and an *interim* Receiver had been appointed under Section 13 of the Provincial Insolvency Act. On July 18th, that is, two days after the sale, the *interim* Receiver made a report to the Court on which an order was passed that the proceeds of the sale were not to be paid to the decree-holders, and a few days later the Court ordered that the money should be given back to the purchasers of the property and that the sale should be set aside. This is the order against which the present application is directed. The case is covered by the decision of this Court in *Sri Chand v. Murari Lal* (1). The sale proceeds were realized before the judgment-debtor was adjudicated insolvent. Therefore, the Receiver had no claim to them. I am informed that the judgment-debtor has not upto date been adjudicated insolvent. However that may be, he had not been adjudicated insolvent when the proceeds of the sale were realized. I allow this application and set aside the order of the Court below. The applicants will get

their costs from the respondent, judgment-debtor.

Application allowed.

A. I. R. 1915 Allahabad 62 (2)

RICHARDS, C. J. AND BANERJI, J.

Bhagwan Dayal and another—Plaintiffs—Appellants

v.

Param Sukh Dass—Defendant—Respondent.

Second Appeal No. 1612 of 1913, decided on 19th January 1915, from the decision of the Sub-J., Aligarh, dated 2nd September 1913.

Civil P. C. (5 of 1908), O. 32, R. 3—Appointment of amin as guardian without notice to minors or their mother is not proper—Decree against minors null and void.

(*Semble*)—Appointment of officer of court as guardian is farce without providing for funds to defend. [P. 63, C. 1.]

A suit was brought against a certain person and his minor nephews. The uncle refused to be the guardian of the minors alleging that they lived with their mother. The Court appointed the *Amin* as the guardian *ad litem* of the minors, without giving any notice to the minors or to their mother in whose care they were. The *Amin* did not make any defence. An *ex parte* decree was made as against the minors. An application was made to set aside the *ex parte* decree on behalf of the minors by their mother. The application was refused. Subsequently a suit was filed for a declaration that the decree was null and void as against the minors :

Held, that the minors not being properly represented in the suit and the *ex parte* decree having been passed without notice to them or their natural guardian, they were entitled to the declaration which they sought in the suit. Case law Ref. [P. 64, C. 1.]

Umashanker Bajpai—for Appellants.

S. C. Banerji—for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiffs claimed a declaration that a decree obtained against them *ex parte* on the 30th of August 1911 was null and void as against them. The decree in question was a decree obtained on foot of a mortgage alleged to have been executed by the father of the plaintiffs and their uncle, Raghubir Sahai. The facts are as follows. The plaintiffs were at the time of the institution of the mortgage suit, and still are, minors. The plaintiffs in the previous suit sought to implead them as defendants through the said Raghubir Sahai as their guardian *ad litem*. Raghubir Sahai refused to be the guardian *ad litem* and informed the Court that the minors lived with their mother, and not

with him. Eventually the Court appointed the *Amin* as the guardian *ad litem* of the minors. This order was made without any notice having been given to the minors, or to their mother in whose care they were. There was no appointed or natural guardian other than the mother. It is not pretended that the Court required the plaintiff to deposit any sum of money to enable the Court *Amin* to employ a Pleader, or to make any inquiry as to the minors' defence. Nor is it pretended that the Court *Amin* did in fact take any step to defend the case or to inquire whether there was a defence. An *ex parte* decree was granted on the 30th of August 1911. An attempt was made on behalf of the minors through their mother to have the case restored, but this application was refused. The present suit was then instituted.

Both the Courts below have dismissed the suit and the plaintiffs come here in second appeal. There can be no doubt that there was great irregularity in the proceedings prior to the granting of the *ex parte* decree. The provisions of Order XXXII, Rule 3, were not observed. The Courts below, however, were of opinion that the decree was not void and could not be set aside on account of the irregularity. They refer to the cases of *Wahan v. Banke Behari Pershad Singh* (1) and *Munshi Munnu Lal v. Ghulam Abbas* (2). We think the Courts below were wrong. Assuming that the decree is not nullity, that in itself would not be a sufficient ground for dismissing the plaintiffs' suit. The Court ought to have considered whether the plaintiffs were prejudiced by the irregularity; if the minors had no opportunity of putting forward a defence to the suit, or in other words, if they were not represented in the Court below, they would be prejudiced. It seems to us that the appointment of an officer of the Court as guardian *ad litem* of minors without requiring the party at whose instance he is appointed to deposit the necessary funds to enable the guardian to defend the case, is little more than a farce. If, however, in the present case the order had been made with notice to the mother she might have objected to the appointment

of the *Amin*, or at least have given him instructions as to the defence of the minors. There is no real hardship in requiring the party to deposit money to enable the Court official to enquire and get instructions on behalf of minors. If the party is successful in the litigation, the funds so deposited can be subsequently recovered. In the case of *Wahan v. Banke Behari Pershad Singh* (1), the minors had been sued and had appeared throughout the proceedings with their mother as guardian *ad litem*. The irregularity in the case was the absence from the record of a formal order appointing the mother guardian *ad litem*. The mother was the person who would naturally have been appointed guardian had an application been made. And by appearing in the proceedings she showed that she had no objection to being guardian. The decree was granted in the year 1881 and the suit challenging its validity was not instituted until January 1895. Their Lordships held that the minors were "substantially" sued in the former suit. Their Lordships quote from the judgment of the High Court the following words: "It is necessary that the Court should see that a proper guardian be appointed to protect their interest. Section 443 of the Code is imperative on this point." Their Lordships then say: "In this statement of the law their Lordships entirely concur, and they desire to impress upon all the Courts in India the importance of following strictly the rules laid down in the section referred to." After this statement it seems to us impossible to contend that minors cannot have a decree declared not binding on them under circumstances like the present, where the appointment of the guardian was not only irregular but where in fact a decree was made without even notice to the minors. In *Munshi Munnu Lal v. Ghulam Abbas* (2) the only irregularity was the absence of the affidavit specified in Section 457 of the Code of Civil Procedure of 1882. This case was even a weaker one than the case above referred to. The minors were clearly and substantially represented and had every opportunity of putting forward their defence. It is contended by the learned Advocate on behalf of the respondent that the only remedy the minors had was to apply to have the *ex parte* decree set aside under the provisions of Order IX, Rule 13,

(1) (1903) 30 Cal. 1021 = 30 I.A. 182 (P.C.)

(2) (1910) 6 I.C. 783 = 32 All. 297 = 37 I.A. 77 (P.C.)

of the Code of Civil Procedure. This rule enables a defendant who has not been served with the summons, or was prevented by some sufficient cause from appearing when the suit was called on for hearing, to have an *ex parte* decree set aside. It is argued that the defendant against whom an *ex parte* decree has been made, who neglects to avail himself of the provisions of this rule, cannot afterwards bring an independent suit. This may be so. But this is not the case here. If the minors were parties to the suit, the only person who could make an application to have the *ex parte* decree set aside would be the Court *Amin* who was their irregularly appointed guardian *ad litem*. No such application was made by him. In our opinion we have to see whether the irregularity in the present case prejudiced or may have prejudiced the minors. Holding as we do that the minors were never properly represented and that the decree was made without notice to them or their natural guardian we think that they are entitled to the declaration sought in the present suit.

We accordingly allow the appeal, set aside the decrees of both the Courts below and decree the plaintiffs' claim with costs in all Courts including in this Court fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 64 (1)

RAFIQUE, J.

Mahabir Prosad — Plaintiff — Appellant

v.

Ram Tawakal and others — Defendants — Respondents.

Second Appeal No. 426 of 1914, decided on 4th March 1915, from the decision of the Dist. J., Benares, dated 16th January 1914

Agra Tenancy Act (2 of 1901), S. 194—*Lambardar alone can sue for entire rent.*

A *lambardar* can sue alone, without joining the other co-sharers of the village, for the recovery of the entire rent due from a tenant. A. I. R. 1914 All. 104 F. B. Foll. [P. 64, C. 2]

M. L. Agarwala—for Appellant.

B. E. O'Connor and L. M. Banerji—for Respondents.

Judgment.—The two appeals Nos. 426 and 427 are connected and they arise out of two suits brought by the appellant, who is the *lambardar* of the village. He

sued as *lambardar* for the recovery of the entire rent due for the year 1319 *Fasli* and part of the year 1320 *Fasli*. One of the pleas in defence was that under Section 194 of Act 11 of 1901 the plaintiff could not sue alone. This objection was allowed by the first Court and the claim was decreed to the extent of the plaintiff's share. On appeal the learned District Judge affirmed the decree of the first Court. The *lambardar* has come up in second appeal to this Court and contends that he can sue alone without joining the other co-sharers of the village. He relies on the full Bench case of *Gulzari Mal v. Jai Ram* (1). The contention for the appellant must prevail in view of the case relied on by him. I, therefore, accept the appeal, set aside the decree of the lower Appellate Court and remand the case for trial on the merits. Costs of this appeal will abide the event.

Appeal allowed; Case remanded.

(1) A. I. R. 1914 All. 104=36 All. 441=24 I.C. 178 F.B.

A. I. R. 1915 Allahabad 64 (2)

PIGGOTT, J.

Bhulan—Defendant—Appellant

v.

Wazir and others — Plaintiffs — Respondents.

Second Appeal No. 1212 of 1914, decided on 18th January 1915, from the decision of the Addl. Dist. J., Aligarh, dated 30th May 1914.

Civil P. C. (5 of 1908), O. 41, R. 27—*High Court not to interfere in appellate court's discretion in refusing to consider evidence taken on remand.*

A High Court is not justified in second appeal in interfering with the discretion of the lower Appellate Court to the extent of refusing to recognize the additional evidence taken on remand under Order XLI, rule 27, of the Code of Civil Procedure. [P. 65, C. 2]

Mohan Lal Sandal—for Appellant.

Judgment.—This was a suit for possession of a house. On the pleadings in the Court of first instance it was admitted that one Chand owned a house which was situated in an enclosure shown as enclosure No. 21 in the map of the village *abadi*, and that it was described as the second of three houses in the said enclosure in the explanatory statement (*khasra*) appended to the said map. The plaintiffs claimed that the house in suit was the said house of Chand, while the defendant replied that

this was not so, but on the contrary the plaintiffs were still living in a house in the said enclosure which was the house No. 2 belonging to Chand referred to in the settlement *khassra*. The lower Appellate Court caused certain further evidence to be taken, and then came to a finding that the house in suit is the house No. 2 belonging to Chand referred to in the Settlement map and *khassra*. It has also recorded a finding that the house in suit was occupied by permission of the plaintiffs by one *Musammatt Nasiban*, who died recently. These are clear findings of fact and this appeal cannot succeed unless the defendant-appellant can show cause for interference with these findings in second appeal. It has not been shown to me that there is any force in the pleas taken in the third and fourth paragraphs of the memorandum of appeal. The District Judge had before him admissions by the parties that the house belonging to Chand, situated within the boundaries of plot No. 21, was the property of the plaintiffs. The defendant said that the house in question was the one in which the plaintiffs were living at the time of the institution of the suit. The District Judge came to the conclusion that this was not the case, because the house in which the plaintiffs were living was situated partly outside the boundaries of plot No. 21 and was shown to have been built after the preparation of the Settlement *khassra* and map which were plaintiff's documents of title. There was no suggestion before the Court that either of the other two houses admittedly situated within the limits of plot No. 21 was the house described in the Settlement *khassra* as the house of Chand. On the pleadings, and on the evidence before him, the District Judge was entitled to come to the findings which he has recorded in favour of the plaintiffs. The only difficulty about the case is that suggested in the first two paragraphs of the memorandum of appeal. The Court of first instance had dismissed the plaintiffs' suit, on the ground that the evidence before it was not sufficient to prove that the house in suit was the house which had formerly belonged to Chand. When the case first came before the District Judge he recorded an order, dated the 28th of April, 1914, to the effect that the conclusion arrived at by the first Court appeared correct on the evidence before that Court. He proceeded, however, to direct further evidence to be taken under O. XLI, R. 27, of the Code of

Civil Procedure. The additional evidence taken was that of a Commissioner, who was ordered to take certain measurements on the spot to enable the Court definitely to satisfy itself as to the manner in which the Settlement map applied to existing facts. The learned District Judge presumably acted under O. XLI, R. 27, Cl. (1) (b), and it cannot be denied that, in the absence of some measurements such as those which were taken by the Commissioner on remand, it was practically impossible to understand how the settlement map applied to the existing facts of the case and the suit would have to be decided more or less by conjecture. The real question is whether the District Judge was justified in ordering further evidence to be taken, and might not have been content with dismissing the appeal before him on the simple ground that the plaintiffs, on whom the burden of proof lay, had failed to prove their case. I do not think, however, that this Court would be justified in second appeal in interfering with the discretion of the lower Appellate Court to the extent of refusing to recognize the additional evidence taken on remand. If this is so, this appeal must necessarily fail and I dismiss it accordingly.

Appeal dismissed.

A. I. R. 1915 Allahabad 65.

RICHARDS, C. J., AND BANERJI, J.

Deo Narayan Singh—Plaintiff-Appellant

v.

Ganga Prasad and another—Defendants-Respondents.

Second Appeal No. 1578 of 1913, decided on 19th December, 1914, from the decision of the Sub-J., Jaunpur, dated 25th June, 1913.

Hindu Law—Father's alienation can be challenged by son if he was then in womb.

A Hindu son subsequently born alive is competent to contest an alienation made by the father when the son was in his mother's womb. (16 Mad. 76; 26 I.C. 61, *Foll.*; (1864) W. R. 340, *Not foll. and Case-law Ref.*) [P. 66, C. 2.]

S. M. Suleman—for Appellant.

Durga Charan Banerji—for Respondents.

Judgment:—The suit which has given rise to this appeal was brought by the plaintiff-appellant for a declaration that a sale-deed, dated the 17th August, 1909, executed by his father, Hansraj Singh, in

favour of Naurang Singh, the predecessor-in-title of the defendants, is null and void as against the plaintiff. The validity of the sale is questioned on various grounds. The lower Court has dismissed the suit, on the finding that the plaintiff was born after the date of the sale and is not, therefore, entitled to question its validity. It has further been found that the plaintiff was in his mother's womb when the sale was made, and it is not disputed for the purposes of this appeal that the property sold is ancestral property. The question to be determined in this appeal is, whether a son who was in his mother's womb at the date of an alienation by the father of ancestral property can contest the alienation. The decision of this question depends on the further question, whether a son in the mother's womb can be deemed to be a co-owner of joint ancestral property.

Under the *Mitakshara* a son acquires an interest in ancestral property by birth, the reason for the rule being, as pointed out by Mr. Gopal Chandra Sarkar in his work on Hindu Law, page 210, 4th Edition, that the father and other ancestors are reproduced in the son. The question is whether birth relates back to the period when the child was in its mother's womb. Under other systems of law, such as the Civil Law and the English Law, a child is deemed for some purposes to be born when it is in its mother's womb. This rule is in several instances recognised by the Hindu Law. In the case of succession by a posthumous son, he takes a share in his father's property from the date of his father's death and he is regarded as being in existence, though he is only in his mother's womb and not actually born until afterwards. Again, in the case of partition, a son *in utero* at the time of partition is deemed to be in existence and the partition may either be postponed or a share should be set apart for him. [See Strange's Hindu Law, page 182, Jolly's Tagore Law Lectures, page 132; *Kalidas Das v. Krishna Chander Das* (1); Mayne's Hindu Law, Section 472, 7th Edition.] It has also been held that the "rights of a son in the womb could not be defeated by a Will made by the father." [*Hanmant Ramachandra v. Bhimacharya* (2) and *Minakshi v. Virappa* (3).] So that in the cases of succession, partition

and Will, a son in the womb has been regarded as one *in esse*. There is nothing to show that in the case of an alienation by sale a different rule obtains. Our attention has not been called to any text of Hindu Law in which an alienation has been excluded from what is deemed to be the general rule. The Courts below have relied on a passage in Mr Golap Chandra Sarkar's Hindu Law, page 210, 4th Edition which is as follows: "A child in the womb is not entitled to all the rights of a child *in esse*. A son's right of prohibiting an unauthorized alienation by the father of ancestral property cannot be exercised in favour of an unborn son." The learned author has referred to the case of *Musamat Goura Chowdhraim v. Chummun Chowdhry* (4) as an authority for the proposition laid down by him. That case, no doubt, supports his view, but it was dissented from by the Madras High Court in *Sabapathi v. Somasunderam* (5). The learned Judges held that "an alienation by a Hindu to a *bona fide* purchaser for value is liable to be set aside by a son who was in his mother's womb at the time of the alienation." In the recent case of *Datta Venkatasubba Raju Garu v. Gattam Venkatarayudu* (6) the same Court assumed that a son could contest an alienation made by his father at a time when the son was in his mother's womb. The same view appears to have been adopted by the Bombay High Court. (See West and Buhler's Hindu Law, page 803.) We agree with this view. Both on authority and on principle we are of opinion that a son subsequently born alive is competent to contest an alienation made by the father when the son was in the womb. The Court below was, therefore, wrong in dismissing the suit on the ground on which it dismissed it. We allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it under its original number in the register and dispose of the other questions which arise in the case. Costs here and hitherto will be costs in the cause. The costs in this Court will include fees on the higher scale.

Appeal allowed; Case remanded.

(1) (1869) 2 B L.R. 103=11 W.R. 11 (F.B.),
(2) (1888) 12 Bom. 105.
(3) (1885) 8 Mad. 89.

(4) (1864) W.R. 340.
(5) (1893) 16 Mad. 76=2 M.L.J. 244.
(6) (1915) 26 I.C. 61.

A. I. R. 1915 Allahabad 67 (1).

BANERJI, J.

Mohammad Husain—Plaintiff-Appellant

v.

Mohammadi Bibi and others—Defendants-Respondents.

Second Appeal No. 307 of 1914, decided on 8th February, 1915, from the decision of the Addl. Sub-J., Moradabad.

Limitation Act (IX of 1908), Arts. 131 and 120—Rent suit governed by Arts. 131 and not 120.

A right to recover rent is a periodically recurring right and a suit to establish such a right is governed by Art. 131 of the Limitation Act, and not by Art. 120 (14 M.L.J. 477, Ref.) [P. 67 C. 1.]

Narmadeshwar Upadhyaya for S. N. Sen—*for Appellant.*

Rahmat Ullah—*for Respondents.*

Judgment:—The parties to the suit out of which this appeal arises are near relatives. The plaintiff has brought this suit against the heirs of his brother, Ahmad Husain, for the establishment of his right to recover rent for the site of the house occupied by the defendants at the rate of eight annas per mensem and for recovery of arrears of rent for nearly three years. Both the Courts below have dismissed the suit on the ground of limitation. They are of opinion that Art. 120 of the first Schedule of the Limitation Act applies to the suit and bars the claim. That Article would be applicable if there is no other Article in the Schedule which would govern a claim of this description. It is contended on behalf of the appellant that the Article which is applicable to this suit is Art. 131, which provides a limitation of twelve years for a suit to establish a periodically recurring right to be computed from the date when the plaintiff had first been refused the enjoyment of that right. A right to recover rent is a recurring right and the present suit is one for establishment of the plaintiff's right to recover rent for the site of the house occupied by the defendants. It is true that in the plaint the prayer, as framed, is a prayer to assess rent, but that is in substance a prayer to establish the plaintiff's right to obtain rent at a particular rate. The claim is clearly one to establish a periodically recurring right and, therefore, the suit is governed by Art. 131 and Art. 120 is inapplicable. It

was held by the Madras High Court in *Jagannath Pandia v. Muthia Pillai* (1), that a right to establish a periodical right to recover rent is governed by Art. 131. Of course, it will be open to the defendants to show that the plaintiff was refused the enjoyment of the right claimed by the defendants' predecessor-in-title at some time prior to twelve years preceding the date of the suit. If they can do so, the claim is beyond time, otherwise it would not be time-barred as the title of Ahmad Husain accrued only under the deed of gift executed in his favour by his father on July 30th, 1900, and this suit was filed on July 30th, 1912. However, the case has not been tried on the merits and these questions have not been determined. I allow the appeal, discharge the decrees of both the Courts below and remand the case to the Court of first instance with directions to re-admit it under its original number in the register and to dispose of it according to law. Costs here and hitherto will be costs in the cause.

Appeal allowed: Case remanded.

(1) (1904) 14 M. L. J. 477.

A. I. R. 1915 Allahabad 67 (2).

PIGGOTT, J.

Ramujagar Panda and others—Plaintiffs-Appellants

v.

Bhagirathi and others—Defendants-Respondents.

Second Appeal No. 819 of 1913, decided on 5th January, 1915, from the decision of the Dist. J., Benares, dated 23rd April, 1913.

Civil P. C. (V of 1908), O. 2, R. 2—Fresh suit on same cause of action for property omitted through mistake is not maintainable by plaintiff or his transferee—Civil P. C. (V of 1908), S. 11.

Where a litigant, who is fully aware of the facts which constituted his cause of action, mismanages his litigation and fails through his own mismanagement to obtain from the Courts the full reliefs to which he is entitled, neither he nor his transferees are entitled to maintain any further suit upon the same cause of action.

[P. 69, C. 1.]

Therefore neither a reversioner to the estate of a deceased, who brought a suit to set aside a sale made by the widow of the deceased and wrongly described the extent of the property claimed by him and on a decree being passed acquiesced in that decree and also in its interpretation, nor the transferee of that property is

entitled to maintain a further suit for the property. (15 Cal. 800 (P.C.); 6 Mad. 844 and 1886 A. W. N. 269, Dist.) [P. 69, C. 1.]

S. M. Suleman—for Appellants.

Gokul Prasad—for Respondents.

Judgment :—The facts of this case must now be dealt with as determined by the findings returned by the lower Appellate Court on the issues remanded by me in my order of the 17th of June, 1914. One *Musammatt Sheo Rani* was in possession of a certain *zemindari* share with a Hindu widow's estate. On July 16th, 1873, she executed a deed of sale transferring this share to the predecessor-in-title of the principal defendants-respondents. She died on the 10th of August, 1905. The reversioner to the estate of Sheo Tahal, husband of *Musammatt Sheo Rani*, was *Musammatt Gulabi Kunwar*, who is impleaded in this suit as defendant No. 6. She brought a suit to recover possession of the property transferred by the deed of the 16th July, 1873, by avoidance of the transfer, on the ground that the said transfer was valid only for the life-time of *Musammatt Sheo Rani*, and she obtained a decree. It so happened, however, that in the sale-deed in question the share thereby transferred was described in a manner which was both ambiguous and inaccurate. *Musammatt Gulabi Kunwar* in bringing her suit copied into her plaint the description of the property as she found it in the sale-deed, and the decree was framed accordingly. When she applied for possession under her decree the Court executing the decree put a certain interpretation on the terms of the decree, with the result that *Musammatt Gulabi Kunwar* only obtained possession of a small fraction of the property which had been actually transferred by the sale-deed of July 16th, 1873. She has since executed a deed transferring to the present plaintiffs or their predecessors-in-title whatever rights she still possessed in the *zemindari* share, which had formerly belonged to Sheo Tahal. The present suit was filed on the 7th of January, 1912. In the plaint as drafted, the position taken up was one which is clearly unsustainable in view of the findings which have now been returned by the lower Appellate Court. The plaintiffs alleged that what was transferred by the sale-deed of July 16th, 1873, was, not the entire share which had belonged to Sheo Tahal and was then in possession of his widow, *Musammatt Sheo Rani*, but

only that small fraction of the said share in respect of which *Musammatt Gulabi Kunwar* had obtained possession under her decree of June 12th, 1906. With regard to the rest of the share it was alleged that the principal defendants had obtained possession of the same, not under the sale deed of July 16th, 1873, but by virtue of a distinct transaction which constituted them trustees on behalf of *Musammatt Sheo Rani* for her life-time. That position has necessarily been abandoned in view of the findings already referred to. It is, however, contended that, upon a correct statement of facts, the present suit is maintainable and the plaintiffs are entitled to a decree. When *Musammatt Gulabi Kunwar* brought the suit which resulted in the decree of June, 12th, 1906, she undoubtedly intended to claim, and presumably did claim, whatever property passed to the principal defendants under the sale-deed of July 16th, 1873. By an oversight she wrongly described the extent of the property claimed by her in her plaint, and she has acquiesced in a decree under which she has obtained a small fraction only of the property to which she was entitled. It is contended for the appellants under these circumstances that, as transferees from *Musammatt Gulabi Kunwar*, they are now entitled to claim upon the same cause of action, namely, the invalidity of the sale-deed of July 16th, 1873, to confer any title extending beyond the life-time of the vendor Sheo Rani, the rest of the property which *Musammatt Gulabi Kunwar* failed to obtain possession of under the decree of June 12th, 1906. This contention is supported by reference to various decided cases, of which the most important are *Amanat Bibi v. Imdad Husain* (1), *Venkata Viraragavayyanagar v. Krishnasami Ayyangar* (2); and *Bhup Singh v. Gulab Rar* (3). The general principles therein laid down are that a right which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a portion of his claim, and that a litigant cannot be required to include in his suit the claim for a relief based upon facts of which he is in ignorance. I do not think these rulings cover the present case. *Musammatt Gulabi Kunwar* knew

(1) (1888) 15 Cal. 800=15 I. A. 106=5 Sar. 214 (P.C.).

(2) (1889) 6 Mad. 844.

(3) (1890) A. W. N. 269.

that her father's share had been transferred by her mother under the sale-deed of July 16th, 1873, and that the vendees were in possession thereof under that deed. She got into trouble because she framed her suit without previously consulting the village papers for a correct specification of this share, but copied down without question the specification given in the sale-deed, which subsequently was proved to be both ambiguous and inaccurate. She has acquiesced in the decree passed upon the incorrect specification given in her plaint, and in an interpretation of that decree which was seriously unfavourable to her. Her case is that of a litigant who, while fully aware of the facts which constituted her cause of action, has mismanaged her litigation and has failed through her own mismanagement to obtain from the Courts the full relief to which she was entitled. Neither she nor her transferees are, in my opinion, entitled now to maintain any further suit upon a cause of action which arises from the sale of July 16th, 1873, and accrued to them on the death of *Musammât Shao Rani* on the 10th of August, 1905. This appeal, therefore fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 69.

RICHARDS, C. J. AND BANERJI, J.

Nathu Mal—Defendant-Appellant .

v.

Kishori Lal Singh and others—Plaintiffs-Respondents.

First Appeal No. 57 of 1914, decided on 22nd February, 1915, from the decision of the Dist., J., Meerut, dated 3rd January, 1914.

Civil P. C., (V of 1908), S. 92—Wide powers—Court can direct taking of accounts and payment of the amount.

The provisions of S. 92 of the Code of Civil Procedure are quite wide enough to entitle the Court to direct an account against a trustee and to make an order upon him to pay the amount found to be due upon the taking of those accounts. [P. 69, C. 2.]

Alston, Tej Bahadur Sapru and Harendra Krishna Mukerji—for Appellant.

S. N. Sen—for Respondents.

Judgment :—This appeal arises out of the same suit as *Raghunath Das v. Kishen Lal* (1). In that suit a decree was made against the appellant here (*Lala Nathu Mal*) ordering him to file accounts. The Court below has found a considerable sum as being due by him. It is contended on his behalf in the first instance that it was not competent to the Court, having regard to the fact that the suit was brought under the provisions of S. 92 of the Code of Civil Procedure, to make a decree against him for an account. He contends that he is not and was not a trustee, and that, therefore, an independent suit was necessary against him to establish his liability. We find, however, on looking at the plaint in Suit No. 4 of 1913 that in paragraph 7 the clearest allegations are made against *Nathu Mal* that he was a trustee and that he entered into possession of the property as such and misappropriated it. *Nathu Mal* put in no written statement and he never appealed against the decree ordering him to account. Under S. 92 the Court may direct accounts to be taken and to grant such further and other relief as the nature of the case may require. In our opinion these provisions are quite wide enough to entitle the Court to direct an account against a trustee and to make an order upon him to pay the amount found to be due upon the taking of those accounts.

It is next contended on behalf of the appellant that the learned Judge found the account against him on insufficient evidence. We find on looking at the record that *Nathu Mal* neglected to appear before the Judge. The Judge, therefore, had to take the accounts as best as he could in his absence. We, therefore, see no reason to interfere with the decree of the Court below and dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

* A. I. R. 1915 Allahabad 70.

Full Bench

RICHARDS, C. J. AND BANERJI AND
TUDBALL, JJ.*Lal Bahadur Singh*—Defendant-Appellant

v.

Abharan Singh and others—Plaintiffs-Respondents.

Second Appeal No. 1530 of 1913, decided on 11th January, 1915, from the decision of the Dist. J., Benares, dated 30th May, 1913.

* (a) *Transfer of Property Act, (IV of 1882), S. 99—Sale in contravention of S. 99 is only voidable—Objection after confirmation is untenable—Civil P. C. (V of 1908), O. 34, R. 14.*

Section 99 of the Transfer of Property Act does not render a sale in violation of the section absolutely null and void, it is only voidable.

[P. 72, C. 1.]

If no objection is taken to such a sale before confirmation, such objection cannot be taken later.

[P. 71, C. 2.]

(b) *Hindu Law—Manager represents the whole family in mortgage suit.*

Per Banerji, J.:—In the case of a joint Hindu family the manager of the family represents the whole family in a suit on a mortgage. (18 All. 325; 27 All. 517; 2 A. L. J. 123 and 1 A. L. J. 260, *Appr. of and Case-law Ref.*) [P. 73, C. 1.]

S. C. Banerji and Gokul Prosad—for Appellant.

Haribans Sahai—for Respondents.

Richards, C. J. :—The material facts connected with this appeal are as follows :—On the 11th of June, 1881, Amir Singh and Musammat Durla Kunwar executed a usufructuary mortgage of certain *zemindari* property in favour of Rani Dharam Raj Kunwar. The real mortgagor was the said Amir Singh. Possession of the *sir* land was not given in accordance with the provisions of the mortgage-deed and the Rani brought a suit against the mortgagors for possession and mesne profits. She obtained a decree, and in execution for mesne profits and costs the mortgaged property was attached, put up to sale and purchased by the Rani. The sale was subsequently confirmed and the usual certificate issued. Lal Bahadur Singh now represents the estate of Rani Dharam Raj Kunwar. The plaintiffs are the grandsons and great-grandsons of Amir Singh, and they have brought the present suit for a declaration that the auction-sale mentioned above is null and void and that

they are still entitled to redeem the mortgage. There is a further claim for a declaration that the plaintiffs, or some of them, are in any event ex-proprietary tenants of the *sir* land.

It seems to me that the only question we have to decide is, what is the effect of S. 99 of the Transfer of Property Act, which was in force at the date of the purchase by Rani Dharam Raj Kunwar? It has not been contended that if the Rani had never occupied the position of mortgagee, and if she had obtained a simple money decree, and in execution of such decree purchased the property, the plaintiffs, who are the grandsons and great-grandsons of Amir Singh, could now set aside the sale and get possession of the property. The contention is that the sale was in contravention of the provisions of S. 99 of the Transfer of Property Act and, therefore, null and void. In my opinion this case must be disposed of on the assumption that the plaintiffs have exactly the same rights as Amir Singh would have had if he had brought the suit instead of them. Section 99 is as follows :—

“Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under S. 67.”

It seems to me that the decision depends on whether a sale at the instance of a mortgagee in contravention of the section was a wholly illegal act. If it was thus, the equity of redemption never vested in the Rani and the mortgage is still capable of being redeemed. Section 99 has been repealed and new provisions have been substituted in the Code of Civil Procedure. Order XXXIV, R. 14, of the first Schedule is as follows :—

“Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgage property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage.”

Two things will here be noticed, *first*, that the provisions of law restraining a mortgagee from bringing mortgaged property to sale is not so wide as previously, and *second*, that the provision finds its place in an Act dealing with matters of procedure and not of substantive law. If

the effect of S. 99 is that all sales in contravention of its provisions are absolutely null and void, great hardship might occur in many cases : for example, a purchase might be made by a perfectly innocent third party who would have to give up the property. In considering the construction of the section I can see no distinction between a purchase by the mortgagee and a purchase by a third party. Undoubtedly the mortgagor, or any one interested in the property in cases governed by S. 99, could object to the sale of the mortgaged property by the mortgagee on foot of a simple money decree, and in all probability the sale could be set aside on this sole ground at any time before confirmation. But can the sale be set aside after the confirmation? This question depends on whether we regard the provisions of the section as enacting that no sale can legally be had, or as merely giving the mortgagor and persons interested in the property a right to object to the sale being had, provided the objection is taken at the proper time, that is to say, sometime before the sale was confirmed.

In the case of *Tara Chand v. Imdad Husain* (1) the plaintiff sued for partition. His title to his alleged share was a purchase by him at an auction-sale at the instance of the mortgagee who had obtained a simple money-decree. A Bench of this Court held that he was entitled to partition notwithstanding the provisions of S. 99. It is true that in that case the Revenue Court had already overruled the objection that the property could not be sold and had confirmed the sale. Nevertheless it is quite clear that if the sale was a nullity, the plaintiff would have acquired no title to the share upon which he based his right to partition. It is true also that the plaintiff in this case was not the mortgagee, but S. 99 restrains the mortgagee from "bringing the property to sale." If any act is rendered illegal, it is the "bringing of the property to sale."

In the case of *Muhammad Abdul Rashid Khan v. Dilsukh Rai* (2) the mortgagees had brought the equity of redemption to sale in exercise of a simple money decree for mesne profits and costs and purchased it themselves. The plaintiffs brought their suit to redeem the property, treating the sale to and purchase by the

mortgagees as a nullity. A Bench of this Court was of opinion that the sale was not a nullity. The sale in this case was apparently before the passing of the Transfer of Property Act. But it seems a clear authority for the proposition that if the mortgagor allows the equity of redemption to be sold and the sale confirmed without objection, he cannot later on take exception to it.

In the case of *Mangli Prasad v. Pati Ram* (3) the question arose as to whether or not the plaintiff had a right to redeem a subsequent mortgage. His claim was based on purchase at an auction-sale of the equity of redemption in execution of a simple money-decree obtained by a mortgagee. A Bench of this Court held him to be entitled. The Court was clearly of opinion that the auction-sale was not a nullity.

Again, in the case of *Madan Makund Lal v. Jamna Kaulapuri* (4) a Bench of this Court laid it down that where a sale has been had of mortgaged property in execution of a simple money-decree and the sale confirmed, the title of the auction-purchaser becomes complete.

In a case reported in *Kishan Lal v. Umrao Singh* (5) exactly the same view was taken.

A contrary view seems to have been taken by Dillon, J., in the case of *Jhabba Lal v. Chajju Mal* (6), but the case of *Tara Chand v. Imdad Husain* (1) and the cases reported in *Mangli Prasad v. Pati Ram* (3) and *Madan Makund Lal v. Jamna Kaulapuri* (4) do not seem to have been brought under the notice of the learned Judge. It seems to me that with the exception of this last-mentioned case and another recent decision to which I shall presently refer, all the decisions of this Court have been in favour of the view that the sale at the instance of a mortgagee of mortgaged property is not a nullity and that if no objection is taken before the confirmation, such objection cannot be taken later.

In the case of *Sirdar Singh v. Ratan Lal* (7) the facts were as follows : Nanda Singh executed a mortgage in favour of Ratan Lal. Ratan Lal sued in 1898, but

(1) (1896) 18 All. 325=(1896) A.W.N. 94.

(2) (1905) 27 All. 517=2 A.L.J. 210=(1905) A.W.N. 80.

(3) (1904) 1 A. L. J. 360.

(4) (1905) 2 A. L. J. 123=(1908) A. W. N. 48

(5) (1908) 30 All. 146=5 A. L. J. 121=(1908) A.W.N. 49.

(6) (1907) 4 A. L. J. 787=(1908) A.W.N. 1.

(7) A.I.R. 1914 All. 343=24 I. C. 612=36 A 516.

only asked for a simple money decree which was granted. In execution of this decree he purchased the property himself. The sons of Nandan Singh were not made parties to the suit in which the decree had been obtained, and they then brought a suit to redeem the mortgage and get possession. A Bench of this Court was of opinion that the plaintiffs were entitled to redeem. With regard to this case, I can only say that in my opinion with regard to the cases governed by S. 99 the restrictions on a mortgagee acquiring the equity of redemption ought to be confined to the provisions of the section, and that in future the substituted provisions of the Code of Civil Procedure should regulate the rights of mortgagors and mortgagees in this respect. If, however, the learned Judges who decided the case of *Sirdar Singh v. Ratan Lal* (7) intended to decide that a sale in contravention of S. 99 was, even after confirmation a complete nullity, such a decision was contrary to the cases previously decided in this High Court with the exception of the one case I have already mentioned. While I admit that the question is not free from difficulty, I think we ought not, without grave reason to depart from a series of rulings of this High Court; and for this reason I do not intend to refer to the rulings of the other High Courts at any great length.

The case of *Ashutosh Sikdar v. Behari Lal Kirtania* (8) was a reference to the Full Bench of the Calcutta High Court. The questions were, (1) whether when a sale has been held in contravention of the provisions of S. 99 of the Transfer of Property Act, the sale is a nullity, or an irregular and voidable sale, and (2) whether the right of redemption of the mortgagor is or is not affected by such sale. Rampini, A. C. J., said in answer to the first question :

"I think we must after the expression of opinion of their Lordships of the Privy Council in *Khairajmal v. Daim* (9), reply that a sale held in contravention of the provisions of S. 99 of the Transfer of Property Act is not a nullity, but an irregular and voidable sale. In my opinion such a sale can be avoided before confirmation of sale by an application under S. 244 of the Code of Civil Procedure without its being necessary for the applicant to show more than that the provisions of

the Transfer of Property Act have been contravened. But after confirmation the sale can only be avoided by an application under S. 244, provided that the applicant proves that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to the sale.

"The case should, therefore, be remanded to the Subordinate Judge to be disposed of after inquiry into these matters and after decision of any other issues that may arise in the case. The costs will abide the result.

"It seems neither necessary nor advisable for us to answer the second question put by the referring Bench."

It seems to me the reason why the learned Acting Chief Justice did not answer the second question was that the answer to the first question answered the second unless the applicant should prove that he was kept in ignorance of the sale proceedings preliminary to the sale.

Brett, Mitra and Woodroffe, J.J., all agreed. Mookerjee, J., referred in a more elaborate judgment at length to the various rulings on the question, but I have no reason to think that he intended to differ from the other members of the Bench.

It is true that Woodroffe, J., was party to a subsequent decision in the case of *Pancham Lal Chowdhury v. Krishun Pershad Misser* (10). With great respect I must confess to be quite unable to reconcile the two decisions. It seems to me that if the equity of redemption is sold in execution of a decree and purchased either by a third party, or by a mortgagee with the leave of the Court, the equity of redemption is transferred from those persons who previously held it to the purchaser and that the result is that if that sale is neither void nor set aside, there is no longer a right to redeem left in the previous owners of the equity of redemption. On the whole, I see no sufficient reason for overruling the previous decisions of this High Court, and I would, therefore, allow the appeal, stating at the same time, though it is perhaps hardly necessary to do so, that we express no opinion on the question whether the plaintiffs have ex-proprietary rights in the *sir* lands. The claim clearly is not a matter for the Civil Court.

Banerji, J. :—I am entirely of the same opinion and have very little to add. The

(8) (1908) 35 Cal. 61=11 O. W. N. 1011=6 C. L. J. 820.

(9) (1905) 32 Cal. 296=32 I. A. 23 (P.C.).

(10) (1910) 6 I. C. 47.

learned Vakil for the respondents laid considerable stress on the fact that the plaintiffs were no parties to the suit in which the decree against Amir Singh was obtained, in execution whereof the equity of redemption in the property in question was put up for sale and purchased by the mortgagee. In the recent rulings of this Court and of their Lordships of the Privy Council, it has been held that in the case of a joint Hindu family the manager of the family represents the whole family. The present plaintiffs must, therefore, be deemed (if they existed at the time) to have been represented by Amir Singh in the suit which was brought against him, and they were thus parties to that suit. As the learned Chief Justice has observed, the plaintiffs cannot claim a higher title than that which Amir Singh could have set up in respect of the mortgage made by him. If Amir Singh could not maintain the present suit, no more can the plaintiffs.

This leads to the question whether by reason of the provisions of S. 99 of the Transfer of Property Act, the auction-sale at which Rani Dharam Raj Kunwar purchased the equity of redemption was a nullity. As has been pointed out by the learned Chief Justice, the course of rulings in this Court has been that such a sale is merely voidable, and not having been avoided before confirmation, it binds the mortgagor and those whom he represented as the managers of the joint family. I deem it unnecessary to refer to those rulings. The only case in which a contrary view was held was that of *Jhabba Lal v. Chajju Mal* (6), decided by Mr. Justice Dillon. With all respect I am unable to agree with him.

The next case on which the learned Vakil for the respondents relies is the recent ruling in *Sirdar Singh v. Ratan Lal* (7). In that case Mr. Justice Rafique distinguished the cases reported in *Tara Chand v. Imdad Husain* (1), *Barh Bal v. Manni Lal* (11), *Kishan Lal v. Umrao Singh* (5), on the ground that the sale in those cases was not in favour of the mortgagee but in favour of a third party. With great deference I fail to see any distinction between the case of a purchase by the mortgagee and that of a purchase by a third party. What the section declares is that a mortgagee shall not be

entitled to bring to sale the equity of redemption of his mortgagor in execution of any claim which he may have, whether arising under the mortgage or not. It does not prohibit the purchase of the property by the mortgagee, if the Court permits him to purchase it and allows a sale to take place. If S. 99 does not render a sale in violation of the section absolutely null and void, there is nothing to prevent a mortgagee purchasing under such a sale with the leave of the Court. It has been held by their Lordships of the Privy Council that a mortgagee who purchases with the leave of the Court is exactly in the same position as any other purchaser. Therefore, the fact of the purchaser being a person other than the mortgagee, in my opinion, makes no difference so far as the application of S. 99 is concerned. The learned Judges in that case do not, as it seems to me, go the length of holding that a sale in contravention of S. 99 is absolutely void. If that is so, and if such a sale is only voidable, it not having been avoided before confirmation, the title of the mortgagor or of those whom he represents or of those who derive title from him passes absolutely to the purchaser, and no right remains in those persons by virtue of which they can claim redemption.

Tudball, J.—*Iconcur.*¹

By the Court.—The order of the Court is that the appeal is allowed and the plaintiffs' suit is dismissed with costs in all Courts, including fees in this Court on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 73.

PIGGOTT, J.

Bhure Lal—Plaintiff-Appellant

v.

Jagan Nath and another—Defendants-Respondents.

Second Appeal No. 204 of 1914, decided on 2nd January, 1915, from the decision of the Dist. J., Jhansi, dated 15th November, 1913.

U. P. Land Revenue Act (III of 1901), S. 118—Duty of co-sharer to get ground rent fixed for site of his building allotted to other co sharer in partition—Failure would deprive him of the site.

Where in a partition proceeding before a Revenue Court a site of a building occupied by a co-sharer is allotted to the share of the other

(11) (1905) 27 All. 450=2 A. L. J. 121=
(1905) A. W. N. 42.

co-sharer, it is incumbent upon the co-sharer in possession of the building to invite the attention of the Revenue Authorities at the time of the partition to the existence of the building and to ask for an order fixing a ground-rent under the provisions of S. 118 of the Land Revenue Act; and if he fails to do so, the other co-owner is entitled to possession in accordance with the partition decree and only an opportunity to remove the materials of the building can be allowed to him. (5 I. C. 664, *fol.*; 22 All. 329, (1906) A.W.N. 194, *Ref.*). [P. 75 C. 1]

Gokul Prasad—for Appellant.

Benode Behari—for Respondents.

Judgment :—This is a second appeal by a plaintiff whose suit has been dismissed by both the Courts below. An unfortunate feature of the litigation is that the plaintiff's case was not properly laid before the lower Appellate Court. There had been a remand by that Court upon certain questions of fact, and findings were returned by the Court of first instance on the issues thus remitted. When the case then came before the learned District Judge for a final decision it was conceded in argument before him that, if the findings of the first Court on the remanded issues were accepted, the plaintiff's suit must fail. This second appeal has now been filed upon a precisely opposite contention, namely, that if the findings arrived at by the Court of first instance, and endorsed by the lower Appellate Court, be accepted, the plaintiff's claim must be decreed. The plaintiff sued for possession of a certain plot of land with certain trees standing thereon by demolition of certain constructions admittedly erected on the land in suit by the defendants. These constructions appear to be an enclosure-wall and a thatched shed. The plaintiff's document of title is a partition decree of July the 1st, 1910, by a Revenue Court. To this partition the plaintiff and the defendants were both parties as co-sharers in the same *mahal*. The Revenue Court allotted the land in suit, with the trees standing thereon, to the *mahal* of the plaintiff. It would appear that no question was raised at the time as to the existence of any building on the land in suit, for the partition order specifies it simply as *parti* or waste land. It necessarily follows that no action was taken under S. 118 of the Land Revenue Act (Local Act III of 1901). It has now been found that for many years prior to the partition of 1910 there had been buildings on the land in suit and

that the said land had for many years prior to the partition been in the exclusive occupation and possession of the defendants, being used by them as a yard or enclosure for the custody of cattle. It appears that whatever buildings originally existed on this land had sometime or other fallen into disrepair, for the finding is that the existing buildings have been re-erected by the defendants upon old foundations. The case might perhaps have been made clearer if there had been a finding as to whether this re-erection of buildings upon old foundations took place before or after the partition of 1910. In view of the fact that both parties at the time of the partition acquiesced in the description of this land as *parti* or waste, and that no question was then raised regarding the existence of any buildings thereon, or the applicability of S. 118 of the Land Revenue Act to the circumstances then existing, I am not sure that I should not be justified in presuming against the defendants that the re-erection of the building took place subsequently to the partition. I do not, however, consider this point material. The case is, in my opinion, governed by the decision of a Bench of this Court in Letters Patent Appeal No. 43 of 1909 [*Nandan Pat Tewari v. Radha Keshun Kalwar* (1)] which decision has been reported in Volume 5 of the Indian Cases at page 664. The decision of the Revenue Court in the partition case must be accepted as conclusive of the fact that, up to July 1st, 1910, the plaintiff and the defendants were joint owners of the land in suit. The exclusive possession and occupation of the defendants prior to that date can only be regarded as having been the possession of a co-owner, and therefore, not adverse as against the plaintiff. If the defendants had intended or desired to set up any claim to exclusive title in respect of this land, they were bound to do so in the course of the partition. The Revenue Court then, as it had jurisdiction to do, took this piece of joint land and assigned it to the *mahal* of the plaintiff. From that date the plaintiff became the sole owner of this plot of land and is *prima facie* entitled to possession of the same as against the defendants. According to the view taken by this Court in this case above referred

to it was incumbent upon the defendants, assuming that any buildings constructed or occupied by them were in existence on the land in suit at the time of the partition, to have invited the attention of the Revenue Court at the time to the existence of these buildings and to have asked for an order fixing a ground-rent under the provisions of S. 118 of the Land Revenue Act. As they failed to do this the plaintiff is now entitled to possession in accordance with the partition decree, and the utmost which the defendants can ask is to be allowed an opportunity to remove the materials of the building standing on the land in suit. This view of the law has been contested in argument before me on behalf of the defendants-respondents on the strength of certain reported decisions of this Court. Such cases as that of *Ashiq Husain v. Muhammad Jan* (2) have no real bearing on the question now before me. They merely lay down the principle that in a partition under the Land Revenue Act the Revenue Court cannot partition buildings or the materials thereof, but is only concerned with the partition of the land. This principle is perfectly correct and is in no way inconsistent with the view of the law taken in the case of *Nandan Pat Tewari v. Radha Keshun Kalwar* (1). There is one case decided by a single Judge of this Court upon which some argument in support of the respondents' case might be based. That is the case of *Iswar Prasad v. Jagarnath Singh* (3). The facts of that case were somewhat peculiar, inasmuch as the plaintiff was seeking to take advantage of the allotment of a certain plot of land to him on partition in order to secure the demolition of a portion of a valuable building, the greater part of which stood on land of which the plaintiff was not the owner. The learned Judge who decided that case did suggest, though apparently by way of *obiter dictum*, that it might still be open to the plaintiff in the case before him to obtain an order fixing a ground-rent for the land of which he was the owner under the provisions of S. 124 of the former Land Revenue Act of 1873. That same learned Judge was a member of the Bench which decided the case of *Nandan Pat Tewari v. Radha Keshun Kalwar* (1) already referred to. I think he would have been prepared to distin-

guish the two cases; whether this be so or not, it is the view of the law laid down by a Bench of two Judges which is binding upon me now. I am of opinion, therefore, that this appeal must prevail. I set aside the decree of both the Courts below and in lieu thereof I give the plaintiff a decree for recovery of possession over the land in suit, with the trees standing thereon, subject to the condition that the defendants will be allowed six weeks from the date of this decree within which to remove the materials of any buildings standing on the land in suit which they may see fit to remove. After expiration of this period the plaintiff will be given possession of the land and trees and of any buildings which may have been left standing thereon. The plaintiff is entitled to his costs, but not in my opinion to his costs in the lower Appellate Court, as the present appeal might not have been necessary if the plaintiff's case had been laid before that Court as it has now been in second appeal. I allow the plaintiff his costs in the first Court and this Court.

Appeal allowed.

A. I. R. 1915 Allahabad 75.

BANERJI, J.

Sunder Lal and others—Defendants-Appellants

v.

Dharam Pal and others—Plaintiffs-Respondents.

Second Appeal No. 326 of 1915, decided on 19th March, 1915, from the decision of the Addl. Sub-J., Aligarh, dated 17th December, 1914.

Partition—Trees go with the land in revenue partition unless otherwise provided.

Trees growing upon land, the subject of a partition by the Revenue Authorities, go with the land and if not excluded must be deemed to have been allotted to him to whom the land was allotted. (23 All. 291, *Foll*). [P. 76, C. 1.]

Bhagwati Shanker—for Appellants.

Judgment:—This appeal arises out of a suit for possession of a plot of land No. 425 together with trees standing thereon and for damages for the value of a tree cut down by the defendants. The Court of first instance found that the land belonged jointly to the parties but that under a partition which took place in 1906, it had been allotted to the share of

(2) (1900) 22 All. 329=1900 A.W.N. 116.

(3) (1906) A. W. N. 194.

the plaintiffs. It was, therefore, of opinion that the plaintiffs were entitled to possession of the land. It, however, held that the trees had been planted by the defendants' ancestors and that the plaintiffs were not entitled to them. That Court whilst decreeing the claim for possession dismissed it in respect to the trees. The defendants submitted to the decree of the Court below, but the plaintiffs appealed. The lower Appellate Court has held and, I think rightly, that as under the partition of 1906 the land was allotted to the plaintiffs and the trees were not excluded from the plaintiffs' share, they must be deemed to have been allotted to the plaintiffs along with the land. This was the view held by a Full Bench of this Court in *Muhammad Sadiq v. Laute Ram* (1). In that case it was held that trees growing upon land, the subject of a partition by the Revenue Authorities, go with the land and may properly be partitioned along with it by the Revenue Authorities. Therefore, even if the trees had belonged to the parties jointly or to the defendants exclusively before the partition, after partition they become the property of the plaintiffs. Furthermore, the lower Appellate Court was of opinion that it had not been established that the defendants' ancestors planted the trees and were the exclusive owners thereof before the partition. This may be an erroneous finding, but being one of fact must be accepted in second appeal. There is, therefore, no force in the appeal. I accordingly dismiss it.

Appeal dismissed.

(1) (1901) 23 All. 291=1901 A W.N. 86.

A I. R. 1915 Allahabad 76.

KNOX, J.

Mt. Kashmiro Bibi—Auction-purchaser—Applicant

v.

Hatim Ali Khan—Applicant-Respondent.

Civil Revn. Appln. No. 107 of 1914, decided on 8th January, 1915, from the order of the Dist. J., Allahabad, dated 10th March, 1914.

Civil P. C. (V of 1908), O. 21, R. 89—Prior mortgage has interest in property for purpose of O. 21, R. 89.

A prior mortgage of a property sold at auction has an interest in the property by virtue of a title acquired before the sale; he is as such entitled to apply to have the sale set aside under O. XXI, R. 89, case-law *Ref.* [F. 78, C. 1].

Damodar Das—for Applicant.

A. Haider, Muhammad Yusuf and Abdul Bari—for Respondent.

Judgment :—Certain property, to wit one anna 8 pies 10 *karants* sayen *jau* out of a 3-annas share in *Mouza Pauran, Mahal Talab Ali*, was sold in execution of a decree.

The notification of sale is to be found on the record as paper 11 C. The language used is very specific. The Court gave notice to would-be purchasers that it was selling not the interest in certain lands, but was selling a well-defined and specific part of immovable property. There is no allusion to any charges or incumbrances on the property and the ordinary meaning of the notification of the sale, which any purchaser would have a right to put upon it, was that this clearly defined and specific property was being sold by the Court.

After the sale and within the period allowed by law Hatim Ali came forward and in an application, which is to be found as 18 A on the record, applied to have the sale set aside on depositing in Court the 5 per cent. of the purchase-money for payment to the purchaser and the amount specified in the proclamation of sale for payment to the decree-holder. In his application Hatim Ali does state incidentally that he was a *murtahin mukuddam* or prior mortgagee of the property sold.

The Munsif of Allahabad in whose Court this application was filed allowed it and set aside the auction-sale. The learned Judge of Allahabad to whom an appeal from this order was presented by *Musammam Kashmiro Bibi* agreed with the view taken by the Court of first instance and dismissed the appeal. *Musammam Kashmiro Bibi* was the auction-purchaser and she applied to this Court in revision, on grounds that the Courts below had no jurisdiction to entertain the application of Hatim Ali, that Hatim Ali Khan was a prior mortgagee of this property and this being the case, he was not a person who held an interest in the property sold by virtue of a title acquired before the sale and he had no *locus standi* and the Courts acted without jurisdiction in accepting and coming to a decision upon his application. There was a further plea that the Courts below acted with material irregularity in setting aside the sale of the property at the instance of such a person as Hatim Ali.

The line which the learned Vakil for the applicant took in argument before me was that the property sold in this case was the equity of redemption over the one anna, etc., share and this being the case, he was not a person who had acquired an interest in the property by virtue of a title acquired before such sale.

In support of his contention reference was made to several rulings passed before the present Code of Civil Procedure came into force. I do not mention those rulings because the language used in S. 310-A was very different from the language now used in O. XXI, R. 89, which has taken the place of S. 310-A. But special stress was laid amongst those rulings on the Full Bench ruling of this Court in *Ram Shankar Lal v. Ganesh Prasad* (1), in which it was held that the words "property comprised in the mortgage" as used in S. 85 were probably intended to denote no more than the estate or interest which is the subject of any particular mortgage, that is, if the mortgage be a mortgage of the absolute estate in the land, then the land itself, if it be a puisne mortgage, then the interest in the land of the mortgagor, that is, the equity of redemption.

The principle laid down in that ruling would strongly favour the contention of the learned Vakil. He continued to draw attention to a ruling of this Court in *Muhammad Ahmadullah Khan v. Ahmad Said Khan* (2). That case, however, was a very peculiar case and cannot be safely relied upon as having universal application. The decree-holder in that case held two decrees against the same judgment debtor, the one being a decree for sale on two mortgages and the other a simple money decree, and caused part of the mortgaged property to be sold by auction. After it was sold and purchased by a stranger the same decree-holder applied to get the sale set aside. The learned Judges refused to consider the decree-holder as a person entitled to apply under O. XXI, R. 89. The line which was adopted is not without interest so far as the present case is concerned. It was held that "ordinarily a mortgagee of the property sold is a person who has an interest in it, and in view of the provisions of R. 89, he would be competent to make an application, but we have to consider the facts of this particular

case. Here the holder of the decree for money was also the holder of two mortgages in respect of the property of which he sought to have a sale. He caused the property to be sold either free from the mortgages or subject to the mortgages. If it was sold free from the mortgages, he must be deemed to have abandoned his mortgages and in that case he has no interest, in the property sold. If he caused the property to be sold subject to the mortgages, the sale only related to the interest of the mortgagor, that is, his right of redemption. In this right of redemption the mortgagee has no interest."

In the present case the property which the Court has professed to sell and which was sold was the property *i.e.*, the one-anna odd share in *Mouza Pauran, Mahal Talab Ali*, and in that property Hatim Ali Khan had undoubtedly an interest by a title acquired before the sale. The Court had jurisdiction to entertain the application. Under the special circumstances of the case when the Court entertained his application, all that it knew was that certain immovable property had been sold in execution of the decree and that the person applying had a right by virtue of a title acquired before the sale to have the sale set aside. The plea then that the Court had no jurisdiction does not prevail with me.

There remains the question, whether the Court, when it was in possession of the facts of the case, acted with material irregularity in setting aside the sale of the property at the instance of a person who had under O. XXI, R. 89, acquired a title before the sale, still to be answered.

Looking to the very wide language used in O. XXI, R. 89, I am not prepared to hold that Hatim Ali Khan did not hold an interest in the property. The language of S. 85 of the Transfer of Property Act differs considerably from the language used in O. XXI, R. 89. Ordinarily I should have followed the ruling of this Court in *Muhammad Ahmadullah Khan v. Ahmad Said Khan* (2), but that case, as I have already said, is a very peculiar case and the Judges had before them the peculiar circumstances of the applicant.

Srinvasa Ayyangar v. Ayyathorai Pillai (3), which was a case decided before the present Code came into force, was a very similar case to the one before me and it was held that a mortgagee came within the

(1) (1907) 29 All. 385=4 A. L. J. 273=(1907) A. W. N. 97 (F. B.).

(2) (1911) 10 I. C. 863=33 All. 481.

(3) (1899) 21 Mad. 416=8 M. L. J. 54.

words "owner of immovable property" of S. 310-A of the former Code. Hatim Ali Khan did in my opinion hold an interest in the property sold by virtue of a title acquired before the sale and he could apply to have it set aside.

The pleas taken fail and the application is dismissed.

As regards costs, there is this important fact that Hatim Ali was called upon by the Court which was selling the property to produce his mortgage-deed at the time it was making an inquiry into the property sold, but he did not produce the mortgage-deed. Under such circumstances I make the order that each party bear its own costs.

Application dismissed.

A. I. R. 1915 Allahabad 78.

TUDBALL AND RAFIQUE, JJ.

Juggi Lal and others—Defendants-Appellants

v.

Kishen Lal and others—(Plaintiffs) and another (Defendants)-Respondents.

First Appeal No. 241 of 1913, decided on 6th March, 1915, from the decision of the Sub-J., Cawnpore, dated 21st April, 1912.

Limitation Act (IX of 1908), Art. 60—Art. 60 governs suit for recovery of deposits—Time runs from demand.

A suit to recover money deposited on interest with a firm is governed by Art. 60 of the Limitation Act and the time runs from the date of demand. [P. 80, C. 1.]

Sundar Lal, Tej Bahadur Sapru and Gulzari Lal—for Appellants.

B. E. O'Connor, W. Wallach and Shiam Krishna Dar—for Respondents.

Judgment :—This is an appeal by one set of defendants as against the plaintiff and the second set of defendants and arises out of a suit for the recovery of money brought in the following circumstances.

The plaintiff's father used to deposit sums of money on interest with the firm of Baij Nath-Ram Nath until his death in August, 1897. He left him surviving his widow and the plaintiff, his son, who was then a minor and who at the date of the present suit in 1912 was about 19½ years old. Payments of various sums on account were made by the firm to the plaintiff's

mother from time to time up to the year 1905.

In this year the firm of Baij Nath-Ram Nath which was a joint family concern, split up into two firms, owing to a separation of the family. These two new firms were Baij Nath-Juggi Lal, represented by the present appellants, and Baldeo Das-Kedar Nath, represented by the second set of defendants-respondents.

The two branches divided up not only their properties but also their liabilities. Each of the new firms took over those liabilities which were due to relations more closely connected to it than to the other firm. For this reason the second set of defendants took over the liability for the debt due to the plaintiff, inasmuch as the plaintiff's father's sister was the wife of Kedar Nath. The defendant Murli Dhar alias Mul Chand (of the second set) is the son of Kedar Nath and he has in clear terms admitted that his branch took over this liability.

It is also a fact that after the partition a number of payments were made to the plaintiff's mother and they were all made by the branch firm of Baldeo Das-Kedar Nath. When the plaintiff came of age (eighteen years), he asked for payment of the amount standing to his credit. Both branches refused payment to the present appellants, stating that they were no longer liable and the plaintiff must seek his remedy against the second set of defendants.

The plaintiff has accordingly sued both sets of defendants.

The pleas raised in defence by the present appellants with which we are now concerned in this appeal were three in number, no others having been pressed before us.

The first was that at the time of the separation the liability in question was taken over by the second set of defendants and the plaintiff's mother expressly consented to this and agreed to look to Baldeo Das-Kedar Nath for payment. The plaintiff is bound by this consent and the appellants are no longer liable for the money. The next is that the suit is barred by limitation. The third is that the appellants are entitled to set off a sum of money about Rs. 5,100.

The Subordinate Judge held as follows:—

(1) that the evidence was insufficient to prove the alleged consent of the mother,

(2) that the suit was not barred by limitation,

(3) that the defendants had failed to prove that any sum as mentioned was due from the firm of Jodh Ram Chunni Lal, for which the plaintiff's father was liable and which the appellants were entitled to debit to the account of the plaintiff.

It repelled the other defences and gave the plaintiff a decree for the sum of Rs. 13,231-10-3 with future interest and costs.

The above three pleas are again pressed before us.

Taking first the question of the mother's alleged consent and assuming that it would be binding if proved on the plaintiff, we find ourselves unable to hold that the evidence establishes beyond reasonable doubt that the mother actually came to such an agreement as is contemplated in S. 62 of the Contract Act.

The only evidence is the statement of Lala Juggi Lal alone and the fact that after the separation whatever payments were made to the mother were made by Murli Dhar. Murli Dhar states openly that as between his branch and the appellants the former alone, is liable if the suit be not barred by limitation, but he denied that the plaintiff's mother was a party to the agreement between the two branches. Lala Juggi Lal's evidence is too vague and wanting in detail to carry conviction to our minds that the widow gave any intelligent consent to the agreement. We doubt very much that she could have understood the legal effect thereof and she at the most probably merely did as she was told to do, in going to Murli Dhar for money. The alleged novation is not proved.

The next question is that of limitation. It is urged that under Art. 59 of the Act of 1877, the present claim had become time-barred before the present Act had come into force and that under the ruling of this Court in *Dharam Das v. Ganga Devi* (1), Art. 59 of the Act of 1877 applied to the circumstances of this case.

The firm of Baij Nath-Ram Nath did banking business and the plaintiff's father deposited his money with them on the condition that interest would be payable and that the banker would re-pay the money on demand. Article 59 of the Act of 1877 applied to the case of money lent under an agreement that it shall be payable on demand. Article 60 referred to the

case of money deposited "under an agreement that it shall be payable on demand."

The basis of the decision in *Dharam Das v. Ganga Devi* (1) was that the ordinary dealings between a native banker and his customers are in the nature of loans made by the latter to the former.

In the course of their judgment the learned Judges said:—"It is far from easy to say to what class of cases the Legislature meant Art. 60 to apply. It may apply to the transactions between a banker and his customers known as 'fixed deposits' or it may apply only to deposits of money made with a private person."

They pointed to the conflict of authority on the question and referred to an unreported decision in First Appeal No. 96 of 1882, decided on 4th April, 1885, as a guide and held that Art. 59 applied. Personally we have doubts as to the correctness of the decision.

Article 60 was a new Article and appeared for the first time in the Act of 1877 and drew a distinction between money "lent" and money "deposited" under an agreement that it shall be payable on demand. In the one case the time began to run from the date of the loan and in the other case from the date of the demand. It seems to us that it was necessary to see in each case whether in fact the transaction was a loan or what in ordinary banking language is known as a "deposit." It does not suffice to say that a deposit is in the nature of a loan. Every deposit, fixed or otherwise, is in the nature of a loan in a banking concern but the Legislature, it seems to us, clearly wished to draw a distinction between the ordinary loan and that class of loan usually known as a deposit, when it introduced Art. 60 for the first time. None of the parties to this suit have called the present transaction a loan. They all speak of it as a deposit in the usual banking sense and it can easily be distinguished from an ordinary loan. However it is apparent that there was considerable conflict of opinion. The various cases are noted in the judgment in *Dharam Das v. Ganga Devi* (1). The Limitation Act of 1877 has now been replaced by the Act IX of 1908, and it is evident from the addition made therein to the language of Art. 60, that the Legislature had before it this conflict of opinion and to make its intention clear and remove the doubt, added the words "including money of a customer in the hands of his banker so payable" to Art. 60. In our opinion this was no

(1) (1907) 29 All. 773 = 4 A. L. J. 628 = 1907 A.W.N. 263.

alteration of the law, but only language used to make clear the real intention of the Legislature when in 1877 it for the first time enacted Art. 60. The Legislature having thus stepped in and made its meaning clear, there is no necessity for us to refer the point for decision of a larger Bench.

We, therefore, hold that Art. 60 does apply. Time began to run from the date of the demand and as the suit was brought within three years thereof, there is no bar of limitation in favour of either set of defendants.

The third plea is that the defendants are entitled to deduct the sum of about Rs. 5,100, which was due from the firm of Jodhraj-Chunni Lal. The story is that the plaintiff's father Ram Chandra, when he deposited money with Ram Nath-Baij Nath, was in the employment of the firm of Jodhraj-Chunni Lal, that the two firms began to deal with each other and Ram Chandra agreed that his money should be security for any sum which might fall due to Ram Nath-Baij Nath from Jodhraj-Chunni Lal and that any such sum should be deducted when the money of Ram Chandra was re-paid. We agree with the Court below that the evidence on the point is most unconvincing. As a matter of fact the sum which Jodhraj-Chunni Lal owed to Ram Nath-Baij Nath was actually written off by the latter firms as a "bad debt." Ram Chandra died in 1897. At no time has the sum ever been debited to his account, as it most certainly would have been debited if he had stood surety for Jodhraj-Chunni Lal. We do not believe the story and the evidence does not convince us and we hold against the appellants. The result of our findings is that the appeal fails and we dismiss it. We award costs to the plaintiff. The second set of defendants, who are the persons really at fault in the matter, will bear their own costs of this appeal.

Appeal dismissed.

A. I. R. 1915 Allahabad 80.

KNOX, J.

Budhu Khan—Defendant-Applicant

v.

Hanuman Pershad—Plaintiff-Respondent.

Civil Revn. Appln. No. 109 of 1914, decided on 8th January, 1915, from the deci-

sion of the Sm. C. Court J., Allahabad, dated 7th May, 1914.

Civil P. C., (V of 1908), S. 115—Question of plaintiff's right to sue as agent cannot be raised in revision—Provincial Small Cause Courts' Act (IX of 1887), S. 25. [P. 80, C. 2.]

The objection, whether the plaintiff is or is not the agent of a particular person on whose behalf he has sued to recover money in the Court of Small Causes, cannot be taken for the first time in the High Court in revision. (12 Bom. 68 *Foll.*)

Nihal Chand—for Applicant.

G. L. Agarwala—for Respondent.

Judgment:—The applicant for revision in this case is one Budhu Khan, who describes himself as a broker at Allahabad. A suit was brought against Budhu Khan and one Gaya Din in the Court of Small Causes at Allahabad. In that suit one Hanuman Pershad apparently represented himself as an agent of His Highness the Maharaja of Darbhanga and got a decree against the applicant and Gaya Din. No objection appears to have been taken upon the point whether Hanuman Pershad was or was not an agent of the Maharaja. The point is, however, taken for the first time in this application for revision. I am not prepared to entertain it when raised for the first time at this stage. I prefer to follow the principles laid down in the case of *Parvatibai v. Vinayak Pandurang* (1).

A second point is raised in the application, *i.e.*, that in face of the lease executed by Gaya Din no decree should have been passed against the applicant who acted as a broker only. This point was considered by the Court of Small Causes and the Court came to the conclusion that Budhu was the lessee, though Gaya Din's name was put in the lease. The Court found that Budhu was not a broker but a lessee and was liable for the balance of the claim made.

This being a Small Cause Court suit, I consider substantial justice has been done and I dismiss the application with costs.

Application dismissed.

A. I. R. 1915 Allahabad 81 (1).

CHAMIER AND PIGGOTT, JJ.

Khushhaliram—Applicant-Appellant

v.

Bholar Mal and others—Opposite Parties-Respondents.

First Appeal No. 113 of 1914, decided on 5th February, 1915, from the order of the Addl. Dist. J., Meerut.

Provincial Insolvency Act (III of 1907), S. 36—Enquiry into a challenged mortgage debt must be made.

Where in a proceeding under the Insolvency Act one of the creditors challenges the mortgage debt of another on the ground that the mortgage deed was fictitiously executed by the insolvent to prejudice other creditors, the Judge is bound to enquire into the question. [P. 81, C. 1 & 2.]

Sital Prasad Ghosh—for Appellant.*Surendra Nath Sen*—for Respondents.

Judgment :—This is an appeal from an order passed by the Additional Judge of Meerut in an insolvency proceeding. One Mutsaddi Lal applied to be adjudicated on insolvent, on the 10th of March, 1914. His application was opposed by one of his creditors, named Khushhali Ram, on various grounds, but he was so adjudicated by an order of the same date. On April 6th, 1914, Khushhali Ram, who was a creditor shown on the insolvent's schedule, presented an application to the Court, the rejection of which has led to the present appeal. The application was badly drafted. It referred to no definite section of the Provincial Insolvency Act and it alluded in a confused manner to two separate transactions, with one of which we are not now concerned. In substance, however, the application was one which deserved more consideration at the hands of the Additional Judge than it has received. The allegation was that a mortgage deed executed by the insolvent on the 26th of November, 1913, in favour of one Bholar Mal, for a sum of Rs. 1,500, was a fictitious transaction, entered into merely to prejudice the creditors of the executant. Whether the application is to be regarded as one asking for the removal of the name of Bholar Mal from the schedule of creditors, or as one falling under the provisions of S. 36 of the Provincial Insolvency Act (III of 1907), the matter was one which required investigation. The learned Additional Judge seems to have

thought that it was quite sufficient for him to note that he had before him a registered document admittedly executed by the insolvent. He held that no further enquiry was required, or could properly be conducted, in the insolvency proceedings, and that Khushhali Ram's remedy, if any, was by way of a separate suit. In our opinion the learned Judge misconceived the extent of his jurisdiction in insolvency proceedings. He was bound to enquire into this question of the alleged mortgage, at the instance of any creditor who claimed to be prejudiced thereby. He might have come to the conclusion that there had been a transfer by way of mortgage under circumstances calling for interference on his part under S. 36 of the Insolvency Act, or he might have found that there had been a purely fictitious transaction, not involving any transfer; in either case the name of Bholar Mal would require to be removed from the list of creditors and the property purporting to be affected by this mortgage would become available for the benefit of all the creditors, free of incumbrance. We think that Khushhali Ram's application should have been taken up notice of the same given to the insolvent and to Bholar Mal, and the questions raised enquired into and decided. We set aside, accordingly, the order complained of and remand the case to the Court below with direction to enquire into the matter as stated above. The costs of this appeal will abide the result of the further enquiry hereby directed.

*Appeal allowed; Case remanded.***A.I.R. 1915 Allahabad 81 (2) (F.B.).**

KNOX, RAFIQUE AND PIGGOTT, JJ.

In the matter of *Shambhu Dyal*

Civil Misc. Appl. No. 236 of 1914, decided on 18th December, 1914, on reference by the Board of Revenue of the U. P.

(a) *Interpretation of Statute—Stamp Act is fiscal enactment and should be construed in favour of subject.*

Stamp Act No. II of 1899 is a fiscal enactment and its provisions should be construed in favour of the subject. [P. 82, C. 2.]

(b) *Stamp Act (II of 1899), S. 4—Instrument of Settlement of property on full stamp—Another instrument confirming first with certain alteration is to be charged with one rupee.*

S and B executed an instrument setting forth a family arrangement regarding their joint property. The deed was stamped as a deed of partition. Subsequently the two brothers executed another instrument, providing *inter alia* that the original deed of agreement should remain in force after certain alterations entered into later on and that both of them were to remain equally binding :

Held, that the principal deed having been charged with the full duty prescribed in Sch. I for settlement of property, the later instrument was chargeable with a duty of one rupee only.

[P. 82, C. 2.]

Ryves—for the Crown.

Judgment :—This is a reference by the chief controlling Revenue Authority of these Provinces made under S. 57 of Act II of 1899. The facts out of which it arises are stated by the Board of Revenue to be that on the 2nd of July, 1912, Raja Shambhu Dial and his brother Babu Brij Kishore executed an instrument setting forth a family arrangement regarding their joint property. The instrument was taken to the Collector of Cawnpore in accordance with the provisions of S. 31 of the same Act and was held to be an instrument of partition chargeable with a duty of Rs. 925. This duty was paid. On the 23rd of August, 1912, the two brothers took another instrument before the same Collector for adjudication as to proper stamp duty to be paid. This instrument provided *inter alia* that the original deed of agreement, namely, of 2nd July, 1912, should remain in force after certain alterations entered into later on. Both deeds were to be equally binding. The alterations referred to were (1) some alterations on purely nominal matters which need not be considered; (2) instead of the sum of Rs. 1,600, fixed for travelling expenses in the deed of prior date, the sum of Rs. 1,500 was to be substituted, out of which Rs. 1,000 was to go to Raja Shambhu Dial and Rs. 500 to Babu Brij Kishore; (3) the sum of Rs. 12,000, assessed value of the house, *kothi*, and garden, was raised to Rs. 15,000. This was to be paid by Raja Shambhu Dial to Babu Brij Kishore. The period of payment which had been fixed as one year was extended to one and half year; (4) the *ahata* was to be made over to Babu Brij Kishore without any compensation whatever; (5) Raja Shambhu Dial was to pay in any case the sum of Rs. 3,000, in the marriage ceremony of Babu Brij Kishore's daughter; (6) a garden out of the joint stock was to remain in the sole possession of Raja Sham-

bhu Dial and Rs. 2,300 were to be given to Babu Brij Kishore. The original deed of agreement was to remain in force except so far as the above alterations were concerned. The Board of Revenue considered that the case fell within the principle laid down in the ruling of this Court in Civil Miscellaneous Case No. 79 of 1912 and were of opinion that the later instrument was a fresh instrument of partition to be stamped *ad valorem*. We sent for the ruling cited by the Board of Revenue. We are agreed that it has no bearing whatever upon the case before us. The obvious intention of the contracting parties was that the settlement of certain moneys and properties covered by the deed of 2nd July, 1912, should be re adjusted. No new property was introduced into the second deed. Both deeds were contingent upon the coming to pass of other events which were at the time of execution events in the future. The intention was that they were to form and to be regarded as one deed. After carefully considering the language used in both deeds and remembering always that Act II of 1899 is a fiscal enactment, that its provisions should be construed in favour of the subject, we hold that the present case falls within the purview of S. 4 of the Act. The principal instrument has been charged with the duty prescribed in Schedule I for settlement of property. The later instrument is chargeable with a duty of one rupee only. A copy of this our judgment under a seal of the Court and signature of the Registrar will be sent to the chief controlling Revenue Authority.

Reference answered.

A. I. R. 1915 Allahabad 82.

TUDBALL, J.

Raghubar Charan — Defendant-Appellant

v.

Krishen Baldeo—Plaintiff-Respondent.

Second Appeal No. 786 of 1913, decided on 4th December, 1914, from the decision of the Dist. J., Cawnpore, dated 4th April, 1913.

Agra Tenancy Act (II of 1901), S. 164 (2)—Lambardar's duty to maintain accounts irrespective of patwari—Burden is on him to prove.

It is the duty of a *lambardar* to maintain accounts of collection and disbursement. The fact that the village *patwari* maintains accounts does not exonerate the *lambardar* or free him from his duty of maintaining his accounts.

In a suit for profits against a *lambardar*, once the liability to account has been admitted by the defendant or held proved against him, it is the duty of the Court trying the suit to call upon the defendant to file his accounts and to produce his books and prove his accounts. [P. 89, C. 1.]

The initial burden on the plaintiff is to prove that the defendant *lambardar* is liable to account. This shifts the burden on to the *lambardar* to prove the accounts. When this has been done, it is open to the plaintiff to prove that there are uncollected items which would not have remained uncollected but for the negligence or misconduct of the defendant. [P. 88, C. 2.]

A. P. Dube—for Appellant.

Harendra Krishna Mukerji—for Respondent.

Judgment :—This is a simple suit for profits. When this appeal came before a learned Judge of this Court, he decided one issue and remitted another for a finding by the Court below. That Court has now found that the plaintiffs have failed to prove that any items of the income remained uncollected by the *lambardar*.

The first Court granted a decree for profits calculated on the collections as recorded in the *patwari's* papers.

The following table shows the demand and the collections recorded by the *patwari* :—

Year,				Demand.	Collections
1315	...	...	...	141 15 8	47 14 3
1316	...	...	...	624 2 0	132 2 0
1317	...	...	...	624 10 0	390 0 0

The lower Appellate Court calculated profits on the figures in the demand column and decreed accordingly.

This Court then remitted the issue noted above.

Now this is a suit against a *lambardar* who acts as the agent of the co-sharers in the management of the village. It is his duty as *lambardar* to maintain accounts. In a suit of this nature once the liability to account has been admitted by the defendant or held proved against him, it is the duty of the Court trying the suit to call upon the defendant to file his accounts and to produce his books and prove his accounts.

The fact that the village *patwari* maintains accounts does not exonerate the

lambardar or free him from his duty of maintaining his accounts. He, no doubt, is bound to furnish true information to the *patwari* to enable the latter to maintain his books, but the *patwari* is not and cannot be always present when the *lambardar* makes collections and it is a mistake to look upon the *patwari's* accounts as the *lambardar's* own accounts.

To proceed, when the *lambardar* has furnished accounts, it is open to the other side to challenge them. The Court then goes into the matter and settles the accounts and should then calculate the profits on what it considers to be on the evidence, the correct figures showing actual receipts and disbursements.

There is an exception to this. In S. 164 (2) it is laid down that the Court may not only award a share of the profits actually collected, but also a share in such sum as the plaintiff may prove to have remained uncollected owing to the negligence or misconduct of the *lambardar*.

It must be noted that this refers only to such sum as may remain actually uncollected.

This section does not throw on the plaintiff the burden of proving the accounts. The initial burden on the plaintiff is to prove that the defendant *lambardar* is liable to account. This shifts the burden then on the *lambardar* to prove the accounts. When this has been done, it is open to the plaintiff to prove that there are uncollected items which would not have remained uncollected but for the negligence or misconduct of the defendant.

Now in the present case, it was the plaintiff's plea in the beginning (*vide* the plaint) and all through the suit that the accounts in the *patwari's* books were untrue or incorrect, that the defendant who is his brother and on bad terms with him, has intentionally not had recorded in the *patwari's* books the sums which he has actually collected.

Now the figures quoted above as recorded in the *patwari's* books rouse the greatest suspicion that this charge is correct. The year 1315 *Fasli* was, no doubt, a famine year and this explains the low demand and low collections, though the Cawnpore District was not a famine district and is canal-irrigated. But in regard to the years 1316 and 1317 *Fasli* there is no explanation offered for the low collections recorded in the *patwari's* books. It has been alleged by the *patwari* that the defendant neither

sued nor distrained for any rents in these years. The burden is, therefore, heavy on the defendant *lambardar* to produce and prove his accounts.

I see that he has not attempted to do anything of the sort, but neither of the Courts below called on him to produce his accounts and prove them and the *patwari's* evidence is practically the only evidence.

In my opinion the case should go back to the Court of first instance for re-trial. The Court should call upon the defendant to produce and prove his accounts and allow the plaintiff an opportunity of challenging them. It may be necessary to appoint a Commissioner to make a local inquiry from the tenantry if either party demands it. If the defendant refuses or fails to produce his accounts, then the Court may be justified in presuming that the *lambardar* has collected the whole of the income and decreeing accordingly; but the circumstances of each case must receive due consideration and weight. If accounts are furnished and the Court comes to a decision as to the amount actually collected, then it may have to consider those items which have remained uncollected by reason of the negligence or misconduct of the *lambardar*, if the plaintiff raises the plea and gives evidence thereon.

I, therefore, allow this appeal. I set aside the decrees of the Courts below and remand the suit to the Court of first instance through the lower Appellate Court, with direction to re-admit the suit on its original number and to proceed to hear and determine it according to law in view of the remarks made above. Costs here and heretofore will be costs in the cause and will abide the result.

Costs in this Court will include fees on the higher scale.

Appeal allowed; suit remanded.

A. I. R. 1915 Allahabad 84.

CHAMIER AND PIGGOTT, JJ.

Sher Khan and others—Defendants-Appellants

v.

Debi Prasad—Plaintiff-Respondent.

First Appeal No. 102 of 1914, decided on 8th February, 1915, from the order of the Dist. J., Aligarh, dated 4th May, 1914.

Agra Tenancy Act (II of 1901), S. 167—S. 167 bars Civil Court's cognizance of suit by auction purchaser of zamindari for declaration that perpetual leases after the decree were not binding.

A decree was obtained on foot of a mortgage-deed for sale of a *Zamindari* property. Before the property was sold the mortgagor executed a perpetual lease in respect of certain lands appertaining to the share in question. The *zamindari* was then put to auction and sold. The purchaser brought a suit in the Civil Court for a declaration that the perpetual lease was not binding on him :

Held, that the suit was not cognizable by the Civil Court by reason of the provisions of S. 167 of the Tenancy Act. (A.I.R. 1914 All. 483, *Ref.*). [P. 85, C. 1 & 2.]

Abdul Raoof—for Appellants.

Tej Bahadur Samru—for Respondent.

Piggott, J. :—This is an appeal by the defendants against an order of the learned District Judge of Aligarh passed under O. XLI, R. 23, remanding to the Court of the Subordinate Judge of Aligarh for decision on the merits a suit which had been dismissed by that Court. The learned Subordinate Judge had held that, on the facts stated in the plaint, the suit was not cognizable by him, being barred by S. 167 of the Agra Tenancy Act (Local Act of II of 1901). This is the finding which the learned District Judge has reversed on appeal and his decision is now challenged before us. There was a mortgage of some *zamindari* property on which a suit was brought and a decree for sale was made, after the mortgage, but before the decree for sale, the mortgagors executed a perpetual lease in respect of certain lands appertaining to the share in question. In execution of the decree for sale the *zamindari* property was put to sale and was purchased by the present plaintiff. He brought this suit in order to get rid of the perpetual lease. As originally drafted, the relief claimed in the plaint was recovery of possession over the land in question as against the defendants lessees. In reply the defendants-lessees claimed the benefit of S. 202 of the Tenancy Act, and were accordingly directed to institute a suit in the Revenue Court for the determination of the question whether or not they held the land in suit as tenants of the plaintiff. They instituted a suit accordingly; but when that suit came up for trial the present plaintiff, who was defendant in the Revenue Court, admitted the existence of a tenancy. He pleaded that the precise nature of that tenancy, and in particular the validity of the perpetual lease under which the present defendants claimed to hold, was not

a matter for determination in that suit. On this understanding a decree was passed to the effect that the plaintiffs in the Revenue Court, who are appellants before this Court, held the land in suit as tenants of the present plaintiff-respondent. After the proceedings in the Revenue Court had thus terminated the respondent obtained leave to amend his plaint, by asking for a simple declaration that the perpetual lease in question was not binding upon him. It was the plaint as thus amended which the learned Subordinate Judge has held not to be cognizable by the Civil Court. The provisions of S. 167 of the Agra Tenancy Act have been discussed in a number of rulings, the most recent of which is that reported in *Ram Singh v. Rao Girraj Singh* (1). As will be apparent from that report, I am myself deeply committed to the view that the provisions of S. 167 of the Tenancy Act do bar a suit like the present. The plaintiff in this case, having obtained possession of the *zemindari* share on his auction purchase, found in existence a perpetual lease of a portion of the property which he regarded as interfering with his full enjoyment of the property acquired by him. His natural remedy, if as a matter of fact the lease was executed under such circumstances as not to be binding upon him, was by way of a suit for ejectment under S. 58 of the Tenancy Act. Such a suit would fall within the provisions of serial number 29 of group (c) of the fourth Schedule to the Act in question and would be cognizable only by the Revenue Courts. The plaintiff in such a case would seek for ejectment of the defendants-lessees on the ground that they hold only as tenants from year to year. In reply the perpetual lease in favour of the said defendants would be set up, and in order to the determination of the question thus raised the Revenue Court would have to decide whether the said lease was valid and binding on the plaintiff. The question is whether the plaintiff can be allowed to oust the jurisdiction of the Revenue Court, and bring his suit before a different *forum* by seeking for a mere declaration. In the judgment which was before the Bench of this Court which decided the case of *Ram Singh v. Rao Girraj Singh* (1), I have discussed this question at some length, and so far as I am concerned I have nothing to add to the reasons which I gave in my judgment

in that case, for holding that the second part of S. 167 of the Tenancy Act must be construed as barring a suit like the present. It may be said that the final decision of the Bench of this Court does not proceed precisely on the lines taken by me. Even, however, confining my decision to the grounds taken by the learned Judges who decided the case of *Ram Singh v. Rao Girraj Singh* (1) on appeal under S. 10 of the Letters Patent, I would say that, if we disregard the form of the present suit, the real substance is clearly one which could have been decided in the Revenue Court. The object of the plaintiff is to get rid of the defendants who claim to hold the land in suit under a perpetual lease. This he can undoubtedly do by a suit in ejectment in the Revenue Court of the nature already explained. I do not think he is entitled to come to the Civil Court for a mere declaration, the only object of which would be to enable him to take further proceedings in ejectment before the Revenue Courts. It seems to me that unless this view is maintained, a conflict of jurisdiction between the Civil and the Revenue Courts in matters of this sort will sooner or later be inevitable. Section 11 of the Code of Civil Procedure could not be applied strictly on its terms so as to make the decision of a Civil Court in a declaratory suit binding on the Revenue Court in a suit for ejectment, for it could be pleaded that the Civil Court had no jurisdiction to try the suit for ejectment. I would accordingly set aside the order of the lower Appellate Court and restore that of the Court of first instance.

Chamier, J. :—The facts of this case have been stated by my learned colleague and I will not repeat them. In the Courts below it was contended on behalf of the defendants that the jurisdiction of the Civil Court was barred by the provisions of S. 167 read with S. 95 of the Agra Tenancy Act. The Subordinate Judge accepted this contention and dismissed the suit. On appeal the district Judge held that S. 95 of the Act did not apply to the case at all, because the plaintiff could not have brought a suit under S. 95 for a declaration as to the validity of the perpetual lease set up by the defendants or to have it declared that the defendants were not the holders of a perpetual lease. Having regard to the definition of the word *class* contained in the Act, it appears to me that a suit for such a declaration would not be a suit for a declaration as to

(1) A.I.R. 1914 All. 488=37 All. 41=26 I.C. 791.

the class to which a tenant belongs, nor do I think that such a suit would be one for a declaration as to the name and description of a tenant within the meaning of Cl. (a) of S. 95, though it was vigorously contended by Mr. Abdul Raoof that the word 'description' covered such a case. In this Court it is contended that even if S. 95 does not apply to the case, yet the jurisdiction of the Civil Court to entertain this suit is barred, because at the date of the suit the plaintiff might have brought a suit for the ejectment of the defendants under Ss. 58 and 63 of the Tenancy Act. It has been held, I think rightly, in several cases by this Court that in a suit for the ejectment of a tenant, if the tenant pleads that he holds under a perpetual lease under which he is not liable to be ejected, it is for the Revenue Court to decide whether the plea is correct or not, but at least three Judges of the Court are further committed to the view that a suit like the one now before us cannot be maintained, because the plaintiff might have instituted a suit in the Revenue Court for the ejectment of the defendants in which the validity of the lease set up by the defendants might have been determined. The case is really covered by the principle of the decision of Richards, C. J., and Banerji, J., in *Ram Singh v. Rao Girraj Singh* (1), in which they approved of the view taken by my learned colleague. On the authorities I feel bound to hold that the question whether the defendants are entitled to hold the land under the perpetual lease set up by them is a "matter in respect of which" a suit might have been brought in the Revenue Court within the meaning of S. 167 of the Tenancy Act, although the plaintiff could not in the Revenue Court have claimed any declaration regarding the lease. It may be doubted whether the authors of the section intended that it should be construed in such a comprehensive manner but a *cursus curiæ* has been established from which I am not prepared to dissent. I agree that this appeal should be allowed and the decision of the first Court restored.

By the Court:—The appeal is allowed. The decree of the lower Appellate Court is set aside and the decree of the first Court is restored with costs here and in the lower Appellate Court. The costs in this Court will include fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 86.

PIGGOTT, J.

Mangat Rai—Applicant

v.

Emperor—Opposite Party.

Criminal Revn. No. 1092 of 1914, decided on 6th January, 1915, from the order of the S. J., Meerut.

Criminal P. C. (V of 1898), S. 436—High Court rarely interferes with exercise of discretion by Sessions Judge under S. 436.

A High Court should be slow to interfere with the exercise of the very wide discretion with which Sessions Judges have been invested under the provisions of S. 436 of the Code of Criminal Procedure. (26 All. 564, *Foll.*) [P. 87, C. 1.]

Satya Chandra Mukerji and Harendra Krishna Mukerji—for Applicant.

R. Malcomson—for the Crown.

Judgment:—A complaint was made by one Bansī against the applicant Mangat Rai, *patwari* of his village, containing allegations which, if proved, would undoubtedly serve to establish the commission of an offence punishable under S. 218 of the Indian Penal Code, if not also an offence under the forgery sections of the Indian Penal Code. After an inquiry which on the face of it appears to have been somewhat cursory, the Magistrate passed an order of discharge without even examining the accused. The matter was taken to the Sessions Judge in revision, and he has ordered a commitment on the record as it stands. I find that his order has since been complied with and Mangat Rai stands committed to the Court of Session on a charge drawn up prior to the filing of this application in this Court. The principles applicable to the conduct of a Magistrate when inquiring into the commission of an offence exclusively triable by the Court of Session and to the exercise of the discretion vested in the District Magistrate or the Sessions Judge by the provisions of S. 436 of the Code of Criminal Procedure, have been very clearly laid down in the case of *Fattu v. Fattu* (1), with which I find myself in the fullest possible agreement. I regard the present case as a somewhat unfortunate one. The inquiry by the Magistrate in the first instance seems to have been perfunctory and unsatisfactory in several respects. Moreover, the Magistrate apparently entertained an opinion that Bansī's denial on oath of the

(1) (1904) 28 All. 564=1 A. L. J. 292=1904 A.W.N. 125=1 Cr. L. J. 519.

genuineness of certain writing purporting to be his signature was of no evidential value unless that denial was corroborated. The Sessions Judge has, on the other hand, so framed his order that he would almost appear to have been under the impression that the Magistrate was bound to commit the accused for trial merely because the evidence given by Bansi, if believed, would justify conviction. The impression left on my mind by an examination of the record is that the case was one in which the learned Sessions Judge would have exercised a sounder discretion if he had ordered further inquiry to be made, instead of ordering commitment on the record as it stands. At the same time it cannot be denied that the Sessions Judge's order was within his discretion, and the ruling to which I have just referred is in favour of the principle that this Court should be slow to interfere with the exercise of the very wide discretion with which Sessions Judges have been invested under the provisions of S. 436 of the Code of Criminal Procedure. Another point for consideration in this case is that there has now been an order of commitment, which it would not be proper for this Court to quash except on a point of law. On the whole as the case now stands, I think it better that the trial of Mangat Rai should proceed in accordance with the commitment order. I dismiss this application.

Application dismissed.

A. I. R. 1915 Allahabad 87.

RICHARDS, C. J., AND BANERJI, J.

Bachcha and others—Plaintiffs-Appellants

v.

Shiam Lal and others—Defendants-Respondents.

Letters Patent Appeal No. 40 of 1914, decided on 16th January, 1915, from the decision of Chamier, J.

Adverse possession—*Placing of Tazia with consent does not create right.*

Where a *tazia* was placed on a particular land for many years by mutual consent of both the Hindu and the Muhammadan population of the locality, no absolute right was thereby created to put the *tazia* on that land. (16 All. 178, *Dist.*) [P. 87, C. 2.]

Rama Kant Malaviya—for Respondents.

Judgment:—This appeal arises out of a suit in which the plaintiffs claimed that they were the Muhammadan residents of a

hamlet known as Rasulabad and that they had a right to place their *tazias* on a particular platform in front of the house once owned by one Mohan. It appears that for many years the Mussulman population and the Hindus had a perfectly friendly arrangement as to where the *tazias* should be placed and that by mutual consent the *tazias* were placed on the platform referred to in the plaint. This land has now become the land of the Government. Close-by a Hindu temple has been built. There is nothing whatever to show that the building of this temple was in any way a hostile act on the part of the Hindus. A new place was agreed to by the majority of the residents as to where the *tazias* should be placed. But the change seems to have been objected to by a few persons. They seem to have called to their assistance the Mussulman residents of other neighbouring villages, who had nothing to do with the hamlet. Both the Courts below have found that the arrangement about the *tazias* was an arrangement come to by mutual consent. In our opinion an arrangement of this kind founded on mutual consent could never become an absolute right and that the case, therefore, is not governed by the ruling in *Mamman v. Kuar Sen* (1). We are bound in second appeal by all findings of fact. Abdul Samad, appellant, who has appeared and argued the case on the point says that the Munsif made a mistake in thinking that he had ever stated in his deposition that he had got the permission from Mohan. It may be that Abdul Samad did not ask the permission of Mohan, but it is nevertheless a finding of the Court that what was done was done by mutual consent of all parties. The plaintiffs, therefore, have no legal right which they are entitled to enforce. We think it a very great pity that the inhabitants of this village should not live amicably together as they used to do in the past. We think that if there had been a little good temper displayed, there would be no quarrel between the residents. We hope also that in future the good relations which previously existed may be restored. We see no reason to differ from the view taken by the learned Judge of this Court and we dismiss the appeal. This now finally decides the question between the parties, and we direct that each party to pay their own costs of this appeal.

Appeal dismissed.

A. I. R. 1915 Allahabad 88.

CHAMIER AND PIGGOTT, JJ.

Muhammad Masih Ullah Khan and another—Plaintiffs-Appellants

v.

Mt. Jarao Bai and others—Defendants-Respondents.

Ex-First Appeal No. 129 of 1914, decided on 25th January, 1915, from the decision of the 2nd Addl. Sub-J., Aligarh, dated 30th August, 1913.

Civil P. C. (V of 1908), O. XXII, R. 10—Mortgage suit pending upto final decree—Purchaser after preliminary decree entitled to be substituted.

Under the Civil Procedure Code, 1908, proceedings after a preliminary decree for sale or redemption are proceedings in the suit and, therefore, a suit for redemption does not come to an end after the passing of a preliminary decree and must be considered pending, within the meaning of O. XXII, R. 10, and the private purchaser of the property after such a decree acquires an interest which entitles him to be made a party to the suit.

Quaere. Whether O. XXII, R. 10, applies to execution proceedings. (9 C.W. N. 171, *Ref.*).

B. E. O'Connor and Suleman—for Appellants.

Durga Charan Banerji and Mohan Lal Sandal—for Respondents.

Judgment:—*Mt. Maimuna Khatun*, on December 22nd, 1908, obtained a preliminary decree for redemption. On appeal to this Court the decision was upheld by a decree, dated May 19th, 1910, which allowed the plaintiff six months from that date to redeem the property. On October 12th, 1912, *Mt. Maimuna Khatun* sold the mortgaged property to the present appellants, leaving in their hands a sum of money sufficient to enable them to redeem the property in accordance with the decree. On April 6th, 1914, the appellants applied to the Court below to be made plaintiffs in the suit in the place of *Maimuna Khatun* and on the same day they applied to the Court to extend the time for redemption and to allow them to pay the mortgage-money into Court. Both applications were dismissed. This is an appeal against the order dismissing the appellants' application to be made plaintiffs in the suit.

The Subordinate Judge seems to have dismissed the application on two grounds, namely, (1) that no execution proceedings were pending at the time when the application was made, therefore, O. XXII,

R. 10, did not apply to the case; and (2) that the decree had not been transferred to the appellants, therefore, O. XXI, R. 16, did not apply. In appeal it is contended that the suit is still pending, and reliance is placed on a decision of the Calcutta High Court in *Bhugwan Das Khetry v. Nilkanta Ganguli* (1) to the effect that a suit of this kind may be "pending" even after the decree absolute. A question is raised as to whether these proceedings are governed by the new Code of Civil Procedure. It seems to us that the proceedings must be held to be governed by the new Code. It is true that the preliminary decree was passed by the Subordinate Judge in December, 1908, just before the new Code came into force, but the case, as already stated, was brought up to this Court and a decree was passed by this Court in May, 1910, after the passing of the new Code. Before the passing of the new Code there was considerable conflict of judicial opinion on the question whether proceedings after a preliminary decree for sale or redemption should be regarded as proceedings in a suit or as proceedings in execution of a decree. Under the present Code there can be no doubt that such proceedings must be held to be proceedings in a suit. We have no difficulty in holding that the suit with which we are now concerned was still pending within the meaning of O. XXII, R. 10, when the appellants' application to be made plaintiffs was filed. In the definition of "decree" contained in the present Code of Civil Procedure, it is explained that a decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. This makes it quite clear that a suit of this kind does not come to an end after the passing of a preliminary decree. In this view it is unnecessary to consider whether O. XXII, R. 10, applies to execution proceedings. It was held by this Court that S. 372 of the old Code of Civil Procedure did not apply to execution proceedings. It is unnecessary to decide whether O. XXII, R. 10, which has taken the place of that section, does or does not apply to execution proceedings. It is sufficient for the present case to say that the suit was still pending when the appellants' application to be made plaintiffs was made. The only other question is whether there has been a devolution of interest which entitles the present

appellants to be made plaintiffs in the suit. The sale-deed executed by *Mt. Maimuna Khatun* transfers the whole of the mortgaged property to the appellants and recites that part of the price has been left in their hands in order that they may proceed to redeem the property. The sale-deed in fact comes very near being a transfer of the preliminary decree. It is quite clear from the terms of the deed that the parties considered that the purchasers of the property would be entitled to redeem the property in the suit in which the preliminary decree had been passed, without holding that there had been a definite transfer of the decree. We have no doubt whatever that there has been a devolution of interest which entitles the appellants to be made plaintiffs in the suit. In our opinion the appellants' application should have been allowed. We, therefore, allow this appeal, set aside the order of the Court below and direct that the name of the appellants be entered as plaintiffs in the place of *Mt. Maimuna Khatun*. The respondents must pay the appellants' costs.

Appeal allowed.

A. I. R. 1915 Allahabad 89.

RICHARDS, C. J. AND BANERJI, J.

Ganga Prasad and others—Plaintiffs-Appellants

v.

Ram Prasad and another—Defendants-Respondents.

Second Appeal No. 1623 of 1913, decided on 23rd November, 1914, from the decision of the Dist. J., Ghazipur, dated 7th August, 1913.

Agra Tenancy Act (II of 1901), S. 95—Suits between rival claimants to cultivating rights are cognizable by Civil Court.

The plaintiffs who were formerly members of a joint Hindu family with the defendants, sued for a declaration that they had some interest in an occupancy holding which belonged to the family. The defendants pleaded that the holding in question had been divided and that the plaintiffs had got consideration for the giving up of all interest therein.

Held, that the claim was one between rival claimants to the tenancy and as such was cognizable by a Civil Court.

[P. 89, C. 2 & P. 90, C. 1.]

Tej Bahadur Sapru—for Appellants.

M. L. Agarwala—for Respondents.

Judgment :—This appeal arises out of a suit in which the plaintiffs sought a declaration that they had certain rights in

cultivatory holdings specified at the foot of the plaint. The facts up to a certain point seem to be undisputed by either side. It is admitted that at one time both the plaintiffs and the defendants were members of a joint Hindu family. In 1893 there was a partition of some property, but the *zemindari* and cultivatory holdings remained undivided. In the year 1907 the *zemindari* was divided. The plaintiffs allege that the cultivatory holdings still remained undivided and that the defendants had begun to lay claim to the whole of them to the exclusion of the plaintiffs. Hence they brought the present suit. The defendants raised a number of technical pleas but on the merits their defence was that the cultivatory holdings had also been divided and that the plaintiffs had got consideration for the giving up of all interest therein. This question on the merits has not been decided by the lower Appellate Court. The case in the first instance came before a Subordinate Judge, who seems to have considered that the relation between the parties in respect of the cultivatory holdings was a matter for the Revenue Court, and he accordingly directed the defendants to institute a suit in the Revenue Court. A suit was in fact instituted and the present defendants obtained a decree in their favour. (The Revenue Court, however, as we shall presently show, never decided the real question between the parties.) The present suit then came on for decision before another Subordinate Judge, who had succeeded the learned Subordinate Judge before whom the case came in the first instance. He considered that his predecessor ought not to have ordered any proceedings in the Revenue Court but ought to have decided the present case on its merits. He found that the plaintiffs were entitled to an interest in the cultivatory holdings, and accordingly decreed the plaintiffs' claim. On appeal the learned District Judge came to the conclusion that the finding of the Revenue Court was conclusive and that he was not entitled to go behind it.

The plaintiffs now come here in second appeal contending that the decision of the District Judge was not correct. It is necessary that we should have clearly before our minds what was the nature of the plaintiffs' claim in the present suit. They claimed that they had an interest in these cultivatory holdings. Their claim was not as *zemindars*, or in any way based on the

fact that they may have been, and probably are, *zemindars* of the villages in which these cultivatory holdings are situate. In other words, their claim in the present suit was a claim between rival claimants to the cultivatory holdings, while the defendants allege that the plaintiffs gave up all claim to the cultivatory holdings for good consideration. A careful examination of the judgments both of the Assistant Collector and the Commissioner in the Revenue Court proceedings will clearly demonstrate that the Revenue Court never decided this question. True it is that the Revenue Court did decide that the plaintiffs were *zemindars* and that the defendants were tenants, but this was not denied. The Revenue Court also seems to have come to a decision as to what was the nature of the tenancy in the cultivatory holdings. Its finding on this question may no doubt be binding, but it has never decided whether or not the plaintiffs had an interest in the cultivatory holdings. Of course it may turn out that the plaintiffs' case is wrong and that the defendants' case is right. All that we decide in the present appeal is that the plaintiffs are entitled to have this question tried out. We allow the appeal, set aside the decree of the lower Appellate Court and remand the case to that Court with directions to re-admit the appeal upon its original number in the file and to proceed to hear and determine the same according to law. The appellant will have his costs of this appeal including fees on the higher scale. Other costs will abide the result.

Appeal allowed; Case remanded.

A. I. R. 1915 Allahabad 90.

BANERJI, J.

Balbhaddar Chaubey — Defendant-Appellant

v.

Somaroo Rai—(Plaintiff) and others—
Defendants-Respondents.

Second Appeal No. 273 of 1914, decided on 5th February, 1915, from the decision of the Dist. J., Ghazipur, dated 15th November, 1913.

Agra Tenancy Act (II of 1901), Ss. 79 and 81—Revenue Court's decision in rent suit between rival claimants to tenancy is not res judicata in civil suit between them—Zamindar's lessee dispossessing previous lessee—Suit under S. 79 lies within 6 months—Civil P. O., S. 11.

A suit between rival claimants to a tenancy can only be brought in a Civil Court, and not in a Revenue Court. Therefore, a decision of the Revenue Court in a suit for rent between rival claimants to a tenancy would not operate as *res judicata* in a subsequent suit in the Civil Court between the same parties.

Where a lessee from the *zamindar* dispossesses a previous lessee, the dispossession of the latter must be deemed to be a dispossession by the *zamindar* through his tenant. The remedy of the dispossessed lessee is a suit under S. 79 of the Tenancy Act within six months of the dispossession. (27 All. 372; 7 I.C. 436, *Ref.*)

[P. 91, C. 1 & 2.]

Parmeshwar Dyal—for Appellant.

Lakshmi Narayan—for Respondents.

Judgment:—This and the connected Appeal No. 274 of 1914 arise out of a suit brought by the plaintiff Somaroo Rai for possession of nine plots of land under the following circumstances. The land in dispute lies in the *zemindari* of Lachhmi Narain, who granted him a lease of the said plots for a term of 16 years on the 11th of January, 1904. On February, 12th, 1906, the same Lachhmi Narain granted a perpetual lease to the appellant, Balbhaddar Chaube, in respect of the said lands and other property and he got mutation of names effected in favour of Balbhaddar. Subsequently in 1908 he sold his *zemindari* to the other defendants. Balbhaddar brought a suit in the Revenue Court against the present plaintiff for arrears of rent in respect of three out of the disputed plots, *namely*, Nos. 116, 165 and 2939, on the allegation that the plaintiff was his sub-tenant. He obtained a decree on the 13th of January, 1913. It is stated in the plaint that suits were brought for arrears of rent in respect of some of the other plots against *shikmi* tenants holding those plots and decrees were obtained against them. All this, according to the allegations in the plaint, took place before 1909. The plaintiff states that these acts amounted to his dispossession and he accordingly brought the present suit for recovery of possession and damages in the Civil Court. The defendants to the suit are Balbhaddar, the subsequent lessee, Lachhmi Narain, the former *zemindar*, and the purchasers of the *zemindari* from Lachhmi Narain. The Court of first instance dismissed the claim in respect of the three plots Nos. 116, 165 and 2939 and decreed it in, regard to the remaining plots. The claim for damages was dismissed. The plaintiff filed an appeal as regards the portion of the claim dismissed and Balbhaddar appealed against that portion of the decree which decreed

the claim in respect of the plots other than the three plots mentioned above. The learned Judge allowed the appeal of the plaintiff and dismissed the appeal preferred by Balbhaddar ; so that it decreed the plaintiff's claim for possession of all the nine plots. The defendant Balbhaddar has preferred these appeals. As regards the three plots Nos. 116, 165 and 2939, the contention put forward on his behalf is that the decision of the Revenue Court in the suit for arrears of rent operates as *res judicata* between the appellant, Balbhaddar, and the plaintiff, Somaroo. This contention has, in my opinion, been rightly disallowed by the Court below. So far as these plots are concerned, the claim is between rival claimants to the tenancy and such a claim could only be brought in the Civil Court and not in the Revenue Court. This has been held in several cases to which I need not refer. The subsequent suit now brought could not be brought in a Court of Revenue and consequently the decision of that Court in the previous suit was not the decision of a Court competent to try the subsequent suit. As regards the remaining plots, the main contention is that the plaintiff has lost his title to the tenancy created in his favour under the lease granted to him on the 11th of January, 1904 by reason of lapse of time. It is urged that the plaintiff was dispossessed from these plots so far back as 1906 and as he did not bring a suit to recover possession as against his landlord and the lessee from the landlord under S. 79 of the Tenancy Act within six months from the date of his dispossession, his right to the tenancy no longer subsists. It was admitted by the Pleader for the plaintiff in the Court of first instance in a statement recorded on the 4th of June, 1913 that the three plots Nos. 116, 165 and 2939 were in the actual cultivation of the plaintiff and that the remaining plots were cultivated by sub-tenants. It was stated that the plaintiff received rent from these tenants for two years, *i.e.*, from 1904 to 1906, and that since the year 1906 the rent payable by the sub-tenants holding the six plots has been realized by the appellant Balbhaddar. It is contended, as I have said above, that the realization of rent by Balbhaddar amounted to a dispossession by the land-holder and as this took place long before the institution of the present suit, the plaintiff's right has become extinguished. This contention is supported by the ruling of this Court in *Ram Lal*

v. Chunni Lal (1). In that case the learned Judge who decided it held as follows:— "When a landholder lets land in the occupation of a tenant to a third party and that third party, acting under the landholders' authority, takes possession of the land, then in my opinion the tenant must be deemed to have been ousted by the land-holder, and his remedy is a suit under S. 79 of Act II of 1901, the person claiming through the land-holder being joined as a defendant to the suit under the provisions of S. 81 of the Act. Such a suit must be brought within six months of the date of dispossession." This view appears to have been accepted by Mr. Justice Chamier in a case reported in 7 Indian Cases, page 486 [*Sokhai v. Ram Pershad* (2), Second Appeal No. 1139 of 1909, decided on July 11th, 1910]. The fact that on the plaintiff's own showing the rent payable by the tenants occupying the plots mentioned above has been realized by Balbhaddar since the year 1906 by virtue of the lease granted to him by the *zemindar*, shows that the plaintiff was dispossessed so far back as 1906 and this dispossession must be deemed to be a dispossession by the *zemindar* through his tenant. It appears from the provisions of S. 81 of the Tenancy Act that when a tenant is dispossessed by a person claiming through the *zemindar*, the tenant's remedy is a suit under the Tenancy Act for recovery of possession against the *zemindar* and the person claiming through him. Therefore the plaintiff's right to recover possession of the six plots having accrued long prior to six months antecedent to the date of the suit, the right to bring such a suit for recovery of possession has become time-barred. This circumstance not only barred his remedy but extinguished his right, as held in *Dalip Rai v. Deoki Rai* (3). That the dispossession of the plaintiff was a dispossession by the *zemindar* is also manifest from the fact that in the plaint itself it is stated that the *zemindar* brought suits for rent against some of the tenants holding the plots in question and obtained decrees and that the plaintiff himself regarded this as amounting to his dispossession. Furthermore, he has claimed relief not only against Balbhaddar but also against the *zemindars*, defendants. The plaintiff has thus ceased to have any

(1) (1904) 27 All. 372=2 A. L. J. 69=1904 A. W. N. 281.

(2) (1910) 7 I.C. 486.

(3) (1899) 21 All. 204=1899 A.W.N. 36.

right to the six plots other than the three plots numbered 116, 165 and 2939. The claim as regards those three plots has been rightly decreed and this appeal must fail. The connected appeal must prevail. I accordingly dismiss this appeal with costs.

Appeal No. 273 dismissed;

Appeal No. 274 allowed.

A. I. R. 1915 Allahabad 92.

BANERJEE, J.

Ganga Prasad—Judgment-debtor-Appellant

v.

Jwala Prasad—Decree-holder-Respondent.

Second Appeal No. 932 of 1914, decided on 11th November, 1914, from the decision of the Addl. J., Farrukhabad, dated 9th May, 1914.

Limitation Act (X of 1908), Art. 182—Judgment-debtor asking for two weeks' time, Court struck off execution application for convenience—Subsequent application after 3 years held to be one for reviving the original.

A decree for the demolition of a house was passed on 31st July, 1907. On 15th of February, 1909, an application was made for execution. On 26th of May, 1909, the judgment-debtor put in an application asking for two weeks' time to demolish the house. The decree-holder consented to it. The Court in order to lighten its file by removal of one case from it ordered to strike off the application for execution. On 21st of July, 1913, the decree holder again made an application that steps should be taken to demolish the house.

Held, that the application of the 21st July, 1913, was an application to revive the former application and the execution was not barred by time. [P. 92, C. 2.]

S. N. Sen—for Appellant.

Gulzar Lal—for Respondent.

Judgment:—The only question in this case is whether the application for execution filed by the decree-holder on the 21st July, 1913, is time-barred. The decree holder obtained a decree on the 31st of July, 1907, for the demolition of a house. On the 15th of February, 1909, an application for execution was made by him in which he prayed that the decree might be given effect to and the house demolished. The judgment debtor put in an application on the 26th of May, 1909, asking for two weeks' time to demolish the house: to this the decree-holder consented. The Court, however, apparently with a view to show

that its file had been lightened by the removal of one case from it, passed an order striking off the application for execution. Meanwhile the brother of the judgment-debtor instituted a regular suit in respect of the house claiming it as his own. On the 18th of June, 1909 the brother of the judgment-debtor applied to the Court to stay proceedings in the execution case, on the ground that he had instituted his suit. Upon this application the Court made an order to the effect that as the execution case had already been struck off the file no order of stay was necessary. After the decision of the suit brought by the judgment-debtor's brother, the decree-holder made his application on the 21st of July, 1913, and prayed that steps should be taken for the demolition of the house. The judgment-debtor contended that execution was time-barred. Both the Courts below have overruled his objection and have held that the application now made by the decree holder must be deemed to be one for the revival of the execution proceedings commenced on the 15th of February, 1909. In my opinion this view is correct. In the year 1909 when the judgment-debtor took time for the purpose of demolishing the house, the Court must be deemed to have stayed proceedings when it granted the application for time. There was no occasion to reject the application for execution. The proper order of the Court ought to have been an order staying proceedings for the period for which time was taken. But as I have said above, it apparently wanted to show a clear file and, therefore, removed the case from the list of pending cases. The order passed on the 26th of May, 1909, must be deemed to be an order staying proceedings until further orders and the present application can only be regarded as an application to revive and continue the proceedings which had thus been stayed. In this view no question of limitation arises and the appeal must fail. I dismiss it with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 93 (1)

RICHARDS, C. J. AND BANERJI, J.

Raghunandan Prasad—Defendant-Appellant

v.

Chem Ram and others—Plaintiffs-Respondents.

Second Appeal No. 918 of 1914, decided on 23rd January, 1915, from the decision of the Dist. J., Budaun, dated 30th March, 1914.

Hindu Law—Debts—Son's pious duty to pay surety debts—Ancestral property liable.

It is the pious duty of a Hindu son to pay the money due under an indemnity clause provided in a sale-deed, not tainted with immorality, executed by his father. The ancestral property in the hands of the son is liable to discharge the debt.

B. E. O'Connor—for Appellant.*Sital Prasad Ghose*—for Respondents.

Judgment:—This appeal arises out of a suit in which the plaintiffs sought to recover money payable to them under an indemnity given to their predecessor-in-title by the father of the appellant. It appears that Murli Manohar and two others executed a sale-deed in favour of the father of the plaintiffs. That sale deed contained a provision to the effect that in the event of any claim being asserted and proved, and in the event of any defect being found in the title of the vendors, the purchaser shall have a right to realise the consideration money from the vendors or their heirs and legal representatives together with damages. In subsequent litigation it was held that two of the vendors were not competent to sell the property beyond the term of their lives and in consequence of this the purchaser was deprived of a part of the property. The plaintiffs thereupon brought the present suit.

The only question is whether the defendant-appellant, the son of Murli Manohar, is liable to discharge the liability created by his father by the indemnity clause, and whether that debt can be realised from the ancestral property in the hands of the appellant. It cannot be said that the debt incurred by Murli Manohar was tainted with immorality. Consequently it is the pious duty of his son to pay that debt, and for the discharge of this pious duty the ancestral property in his hands is liable. The view of the Court

below is, therefore, right. We dismiss the appeal with costs including in this Court fees on the higher scale.

*Appeal dismissed.***A. I. R. 1915 Allahabad 93 (2)**

TUDBALL, J.

Bishan Prasad—Applicant

v.

Emperor—Opposite Party.

Criminal Revn. No. 1086 of 1914, decided on 18th December, 1914, from the order of the Mag., Mainpuri.

Penal Code (XLV of 1860), S. 185—Bidding in false name and without intention of selling drugs is offence under S. 185.

A person who bids at a sale held by a Collector of the right to sell drugs in a certain area without any intention of performing the obligation under which he is laying himself at the time of bidding, and gives a false name, is guilty of an offence under S. 185 of the Indian Penal Code.

R. Alston and Satya Chandra Mukerji—for Applicant.

Assistant Govt. Advocate—for the Crown.

Judgment:—The applicant, Bishan Prasad, has been convicted under S. 185 of the Penal Code and has been sentenced to a fine of Rs. 100. He made bids at a sale held by the Collector of the right to sell drugs in a certain Tahsil and gave a false name. When finally his last bid was sanctioned by the Board of Revenue he denied that he had ever made any bid at all and he has accordingly been prosecuted under S. 185 of the Code. The point raised on his behalf is that S. 185 does not contemplate a sale of this description. The language of the section, however, is wide. The right to sell drugs, *i. e.*, the monopoly granted for a certain area comes within the definition of property. It is impossible to hold that the word 'property' in S. 185 is not used in its wide sense. The gist of the offence in the present case was the intention in the appellant's mind not to perform the obligation under which he was laying himself at the time of bidding. The facts having been found against him they clearly, in my opinion, come within the offence mentioned in the section. The case is similar to that of *Queen v. Reazooddeen* (1). There is no ground for interference. The application is, therefore, rejected.

Application rejected.

A. I. R. 1915 Allahabad 94 (1)

RICHARDS, C. J. AND BANERJI, J.

Baldeo Sahai—Plaintiff-Appellant

v.

Behari Lal and others—Defendants-Respondents.

Second Appeal No. 1540 of 1913, decided on 23rd November, 1914, from the decision of the Sub-J., Meerut.

Negotiable Instruments Act (XXVI of 1881), S. 8—Debtor cannot dispute want of consideration but only validity of the assignment of promissory note.

In a suit by the assignee of a promissory note to recover the money due under the note, all that the executant is entitled to have ascertained is that the plaintiff is the legal holder of the note, and able to give him a good discharge; he cannot question whether consideration was paid or not paid by the assignee. [P. 94, C. 1.]

S. C. Banerji—for Appellant.*Sital Prasad Ghose*—for Respondents.

Judgment :—This appeal arises out of a suit in which the plaintiff sought to recover the amount due under a promissory note. A number of pleas were taken, and amongst others a denial of consideration. The Court of first instance granted the plaintiff a decree. The lower Appellate Court reversed the decision of the Court of first instance and dismissed the plaintiff's suit. Both Courts have found that there was good consideration for the note. But the lower Appellate Court has held that the plaintiff, who is the holder of the note under an assignment, dated the 17th of June, 1912, did not give any consideration for the assignment of the note. It seems to us that this finding was immaterial. Even if we assume the finding to be correct, the defendants, Behari Lal and Nathu Singh, have no concern with the question whether consideration was paid or not paid by the assignee of the note. If they are liable under the note, all that they are entitled to have ascertained is that the plaintiff is the legal holder of the note and able to give them a good discharge. It is quite clear that the plaintiff is entitled to give a discharge to the defendants. The case cited has no application to the present case. In that case the transferor was a party to the suit and he repudiated the transfer in favour of the plaintiff, contending that he had retained all his original rights. We must allow the appeal and setting aside the decree of the Court

below, restore the decree of the Court of first instance. The appellant will have his costs in this Court and in the Court below.

*Appeal allowed.***A. I. R. 1915 Allahabad 94 (2)**

CHAMIER AND PIGGOTT, JJ.

Pothi Ram and others—Defendants-Appellants

v.

Mst. Islam Fatema and others—Plaintiffs-Respondents.

First Appeal No. 176 of 1914, decided on 12th January, 1915, from an order of the Addl. Sub-J., Bareilly, dated 1st Sept, 1914.

Contract Act (IX of 1872), S. 27—Landholder recovering market dues does not trade in selling cattle—Agreement between two landholders not to hold markets on same day is not void.

A landholder who, in return for market tolls or fees, allows a cattle market to be conducted on his land, is not thereby exercising the trade or business of selling cattle. [P. 94, C. 2.]

Therefore, an agreement between the owners of two neighbouring lands to the effect that a market for sale of cattle shall not be held on the same day on the lands of both of them, is not void under S. 27 of the Contract Act.

[P. 95 C. 1.]

Tej Bahadur Sapru—for Appellants.

Judgment :—The question raised by this appeal is the applicability of the principle laid down in S. 27 of the Indian Contract Act (IX of 1872) to the circumstances of this particular case. It is alleged that the defendants, who are landholders, had entered into a contract with certain neighbouring land-holders as to the holding of markets on their respective lands. The plaintiffs sued for enforcement of this contract and for damages. The first Court threw out the case on the finding, that the agreement was void, in that it was an agreement restraining the defendants from exercising a lawful profession, trade or business, and that consequently it was not necessary to go into any of the other questions raised by the pleadings. The lower Appellate Court has reversed this decision and remanded the case for trial on the merits. The question is whether the owner of land entering into an agreement with the owner of neighbouring land, to the effect that a market for sale of cattle shall not be held on the same day on the lands of both of them, is entering into an

agreement which is void under S. 27 aforesaid. It seems to us that a land lord who in return for market tolls or fees, allows a cattle market to be conducted on his land is not thereby exercising the trade or business of selling cattle. If he is exercising any business at all, he is exercising the business of a land holder, and the agreement on his part not to allow his land to be used for some particular purpose on some particular day is not an agreement restraining him from exercising a lawful profession, trade or business. These considerations are sufficient to dispose of this appeal. It is accordingly dismissed.

Appeal dismissed.

A. I. R. 1915 Allahabad 95.

RICHARDS, C. J. AND BANERJI, J.

Kashi Ram and others—Plaintiffs-Appellants

v.

Het Singh and others—Defendants-Respondents.

Second Appeal No. 1241 of 1913, decided on 25th November, 1914, from the decision of the Dist. J., Agra, dated 14th August, 1913.

Transfer of Property Act (IV of 1882), S. 100—Co-mortgagee redeeming prior mortgage has prior charge.

A co-mortgagor who discharges a prior mortgage has a prior charge over the property as against those who discharge a subsequent mortgage. (1 I.C. 825, *Ref.*) [P. 96, C. 1.]

S. K. Dar—for Appellants.

Durga Charan Banerji—for Respondents.

Judgment :—The facts connected with the suit out of which this appeal arises are a little complicated, but they nevertheless may very shortly be stated. Tikam Singh made a mortgage in the year 1880 of a village called Kokna. A second mortgage was made in the year 1889 by the same Tikam Singh and five of his sons. A third mortgage was made in the year 1891 by the same Tikam Singh and two sons. The village was at that time joint family property. Subsequently the sons of Tikam Singh divided the village into a number of *mahals*. The mortgagee under the mortgage of 1880 brought a suit against Het Singh, one of the sons, with the result that his *mahal* was sold and the mortgage discharged. Het Singh brought a suit

against his brothers and their children claiming contribution under S. 2 of the Transfer of Property Act and obtained a decree. In the meantime, however, the plaintiffs had discharged the two later mortgages and they brought the present suit claiming that they also had a charge under S. 82. It was useless to them to claim any charge against the *mahal* which had belonged to Het Singh, because that *mahal* had been sold in discharge of first mortgage. A number of questions were gone into in the Court below which, it appears to us, were not very relevant. The Court of first instance granted the plaintiffs a decree. The lower Appellate Court modified the decree of the Court of first instance by dismissing the suit of some of the plaintiffs, on the ground that they pleaded their claim as a set-off to the suit brought by Het Singh, that such plea was decided against them and that accordingly on the principle of *res judicata* they could not now set up a claim which was disposed of in the previous litigation. Had it been necessary to decide the point, we doubt very much that we would have agreed with the lower Appellate Court on this question of set-off. It seems to us very doubtful whether under the circumstances of the present case the claim of the plaintiffs could have been "set-off" against the claim of Het Singh in the previous litigation. In the view we take of the case, however, it is unnecessary to decide this point. It seems to us that the only question which it is necessary to decide is the question of the priority of the charge of Het Singh. The mortgage of 1880 was not discharged until the 20th of April, 1907. If Het Singh's charge is to take priority as of this date, then it would appear to us that the plaintiffs would be entitled to make the "interest" of the defendants, *i.e.*, their charge contribute rateably to the discharge of the two mortgages of 1889 and 1891. On the other hand if Het Singh's charge takes priority from the date of the mortgage of 1880, then the plaintiffs are not entitled to any charge under S. 82 of the Transfer of Property Act. The very question seems to have arisen in the case of *Har Prasad v. Raghunandan Prasad* (1). At page 168 of the judgment there is the following passage:—"The next question is whether this charge can take priority over the plaintiffs' mortgage. No doubt the charge

came into existence when the mortgage was paid off, but as the person who acquired the charge had discharged a prior mortgage he acquired, we think, priority over an intermediate puisne mortgagee. There can be no doubt that a subsequent mortgagee or the purchaser of the equity of the redemption, who pays off a prior mortgage, acquires on equitable grounds priority over a puisne mortgagee. On the principle of subrogation he is substituted for the prior mortgagee and acquires the rights of such mortgagee and the benefit of the securities held by him. We fail to see any difference in principle between the case of a subsequent mortgagee or purchaser of the equity of redemption and that of a co-mortgagor who satisfies a prior mortgage. Both classes of persons relieve another and his property of the liability which attaches to them and the same principles of justice and equity which apply to the one class equally apply to the other."

Applying this principle to the present case, it would appear that the plaintiffs' position cannot be placed higher than that of standing in the shoes of the mortgagees under the mortgages of 1889 and 1891, that is to say, that they are puisne to Het Singh and his successors-in-title, who for the purposes of the present claim stand in the shoes of the mortgagees under the mortgage of 1880, which was discharged by the sale of Het Singh's property.

This being so, it is clear that none of the plaintiffs have any right against the person or property of the defendants. The result is that we must dismiss this appeal with costs, including fees in this Court on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 96.

PIGGOTT, J.

Kashinath—Applicant

v.

Shanker Ram and others—Opposite Parties.

Criminal Revn. No. 6 of 1915, decided on 4th January, 1915, from the order of the District Magistrate, Benares.

(a) *Criminal P. C., (V of 1898), S. 16—Accused be acquitted giving benefit of doubt, when bench of Hon. Magistrates equally divided.*

Where there is an irreconcilable difference of opinion between the members of a Bench of two Honorary Magistrates as to the guilt of an accused, they should follow the principle laid down by the Local Government for their guidance though not formally issued by the District Magistrate of their district under S. 16 of the Criminal Procedure Code and, giving the benefit of the doubt, should acquit the accused.

(b) *Criminal P. C., (V of 1898), S. 432—No provision for reference by Honorary Magistrates when equally divided.*

A reference by a Bench of Honorary Magistrates on difference of opinion between them to a District Magistrate is irregular and not justified by any provisions of Criminal Procedure Code.

Satya Chandra Mukerjee—for Applicant

Judgment :—In this case a number of persons were on their trial before a Bench of Magistrates exercising jurisdiction within the limits of the Municipality of Benares. That Bench consisted of two members, Pandit Ram Chander Naik Kalia and Babu Sita Ram. I find on a reference to the Civil List of this Province that each of these Magistrates sitting singly exercises the powers of a Magistrate of the third class, but that any two Magistrates within the Municipality of Benares sitting together as a Bench are empowered to exercise the jurisdiction of a Magistrate of the second class. After a complete trial the two Magistrates differed in opinion. Pandit Ram Chander Naik Kalia found the four accused persons not guilty and recorded a judgment concluding with an order of acquittal, Babu Sita Ram was of opinion that the offence charged was proved against all the accused persons and recorded a judgment convicting and sentencing them to pay a fine of Rs. 50 each. The two Magistrates then signed an order referring the case to the District Magistrate of Benares for consideration and orders. The District Magistrate recorded a note upon this reference, to the effect that under the standing rules for conduct of business by a Bench of Honorary Magistrates, "when there is a Bench of two and one is for conviction and the other for acquittal, the accused is to be acquitted." No further orders appear to have been passed in the case. The complainant has brought the matter before this Court in revision. The proceedings of the Honorary Magistrates were, as a matter of fact, irregular. Under S. 16 of the Code of Criminal Procedure the Local Government may, or subject to the control of the Local

Government the District Magistrate may make rules consistent with this Code for the guidance of Magistrates' Benches respecting various subjects, including amongst others "the mode of settling differences of opinion which may arise between the Magistrates in Session." The Local Government has drawn up a draft of certain rules recommended for general adoption. The seventh of these rules provides as follows:—"In regard to a finding, when the number of the members is uneven the opinion of the majority shall prevail, when the number is even and the members are equally divided the accused shall get the benefit of the doubt." The intention of the Local Government in framing these draft rules obviously was that the District Magistrates should formally issue the said rules, or rules to the same effect, for their own districts in the exercise of the powers conferred upon them by S. 16 of the Code of Criminal Procedure. It is not clear whether this has been done for the Benares district, but under the circumstances I do not think it worth while to make further inquiry on this point. Even supposing that no formal order has been issued by the District Magistrate of Benares in this matter, the Bench of Honorary Magistrates, when they found that there was an irreconcilable difference of opinion between them as to the guilt or innocence of the accused in this particular case, might well have accepted the principle laid down by the Local Government and passed orders accordingly. The order of reference to the District Magistrate was irregular and not justified by any of the provisions of the Code of Criminal Procedure. As the record now stands before me, the trial of the accused persons is technically incomplete. The District Magistrate's endorsement on the order of reference is not in itself, and obviously not intended to be, an order of acquittal. Strictly speaking the record requires to be completed by a formal order, signed by both the Magistrates, to the effect that, in view of the difference of opinion embodied in their respective judgments, they follow the principle laid down by the Local Government for their guidance and giving the accused the benefit of the doubt, formally acquit them. I do not think, however, that the interference of this Court is called for. For one thing it is clear that in sub-

stance the opinion of the Magistrate who was in favour of the accused persons has been given effect to. If, however, any parties concerned think it desirable to move the Bench of Magistrates, or the District Magistrate himself, with a view to correcting the informality which I have noticed and placing on the record a proper order finally disposing of the case, I have no doubt that in view of the remarks which I have made such a course would be adopted.

I dismiss this application.

Application dismissed.

A. I. R. 1915 Allahabad 97.

RICHARDS, C. J. AND BANERJEE, J.

Mangal Sen and others—Plaintiffs—Appellants

V.

Muhammad Hussain and another—Defendants—Respondents.

Letters Patent Appeal No. 19 of 1914, decided on 4th December, 1914, from the decision of Tudball, J., dated 12th December, 1913, in Second Appeal No. 725 of 1912.

Contract Act (IX of 1872), S. 2 (d)—Equity grants relief where no privity of contract—No equity between lessee of muafidar and his zamindar—Zamindar cannot sue lessee of muafidar for rent.

A plaintiff cannot make a defendant liable upon a contract to which the plaintiff was not privy, but in such cases as the defendant would be held liable in "Court of Equity" the Courts in this country should hold him liable.

[P. 98, C. 2.]

A zamindar who is entitled to zamindari dues from his muafidar is not entitled to sue a lessee from the muafidar for the dues when he was not privy to the contract between his muafidar and lessee, although the lessee agreed in his contract to pay the zamindari dues, as the zamindar has no such equity against the lessee as a Court of equity would enforce in his favour.

[P. 98, C. 1 & 2.]

Tej Bahadur Sapru—for Appellants.

B. E. O'Connor—for Respondents.

Judgment:—This appeal arises out of a suit in which the plaintiffs claimed zamindari dues. They made defendants to the suit a certain muafidar and also two lessees from the muafidar. It is admitted that the zamindars were entitled to dues (though not the amount claimed) from the muafidar. Under the terms of the lease the other defendants, that is to say, the lessees from the muafidar, undertook to pay the zamindari dues. The plaintiffs mainly claimed

against the lessees, but stated that for the sake of precaution the *muafidar* was also made a defendant and that if they were not entitled to a decree against the lessees they might have a decree against him. The lessees (the respondents to the present appeal) pleaded, *first*, that they were not liable to the plaintiffs, inasmuch as they had never entered into any contract with them, and *secondly*, that if they were at all liable the dues were not as claimed by the plaintiffs. The Court of first instance granted a decree against the present respondents exempting the *muafidar*. The respondents appealed with the result that the decree of the Court of first instance was confirmed. The plaintiffs preferred no appeal against the dismissal of their claim against the *muafidar*. In second appeal to this Court the decrees of the Courts below were set aside and the plaintiffs' suit dismissed. Against this decree the plaintiffs have preferred the present Letters Patent appeal.

The only point to be decided is, whether or not under the circumstances of the present case the plaintiffs were entitled to sue the defendants, the lessees. It is admitted that there was no privity of contract. It is also admitted that the respondents' liability (if any) is under the terms of their contract with their lessor, the *muafidar*. In our opinion the learned Judge of this Court was correct in the view he took. The learned Advocate on behalf of the appellants contends that wherever there is a contract under which a third party may obtain a benefit, he is entitled to sue upon that contract just as fully as he could do if he had been a party to it. We think that such a proposition is altogether too wide. In the present case it is pretty clear that if the plaintiffs thought it was to their advantage, they might even have refused to recognise the respondents as the persons liable to pay their dues. We may also point out that in many cases it would be extremely inconvenient that parties should be sued by persons who were no parties to the contract. On the strict words of the present contract the lessees were liable to pay "the *zemindari* dues," and yet we find that there is a difference of opinion between the plaintiffs and the respondents as to the amount of these dues. The plaintiffs never agreed to accept the respondents as the persons to whom they would look for the payment of their dues. They never in any way altered their position in consequence of the contract which

the respondents entered into with their lessor. We think there can be no doubt that the general rule is that a party cannot make another person liable upon a contract to which the suing party was not privy. There are no doubt exceptions to this rule. We think that it may fairly be said that in all such cases as the defendant would be liable in a "Court of Equity," the Courts in this country should hold him liable. But we do not think that the present is a case in which a "Court of Equity" could grant the plaintiff relief. The case of *Nawab Khwaja Muhammad Khan v. Husaini Begum* (1) has been cited. In that case there was a marriage arrangement between the defendant and the father of the plaintiff, whereby the defendant agreed to pay Rs. 500 a month to the plaintiff and charged certain property with the payment of the money. It was held that the plaintiff, although no party to the contract, was entitled to enforce it. At page 413 of the Report their Lordships of the Privy Council say: "Here the agreement executed by the defendant specifically charges immovable property for the allowance, which he binds himself to pay to the plaintiff; she is the only person beneficially entitled under it. In their Lordships' judgment although no party to the document, she is clearly entitled to proceed in equity to enforce her claim."

The case of *Touche v. The Metropolitan Railway Warehousing Company* (2) was also quoted. There the plaintiff had done work at the instance of a promoter of a Company. The Articles of the Association provided that in certain events the sum of £2,000 would be paid to one of the promoters for the plaintiff who had done the work. It was held that the plaintiff could get the money from the Company. A copy of the Articles of Association had been sent to the plaintiff, he had done the work and the Company had got the benefit of his labours.

In the case of *Deb Narain Dutt v. Ram Sadhan Mandal* (3) it was also held that the plaintiff, though not a party to the arrangement between the defendant and the third party, was entitled to be paid a sum of Rs. 300 and interest. At page 142 the facts of the case are briefly stated by the learned Chief Justice: "On the 22nd

(1) (1910) 32 All. 410 = 7 I. C. 237 = 37 I.A. 152 (P.C.).

(2) (1871) 6 Ch. App. 671 at p. 677.

(3) (1913) 20 I.C. 630 = 41 Cal. 137.

July, 1899, defendants Nos. 1 to 4 borrowed from the plaintiff a sum of Rs. 300, and, by way of security for this, they gave a personal covenant by a registered bond, and also purported, though ineffectually, to create a charge, by deposit of a *patta* relating to immovable property. Interest was paid on this bond up to the 13th of April, 1903, and, on the 18th of August, 1903, defendants Nos. 1 to 4 executed a registered instrument of transfer of all their property, movable and immovable, to defendant No. 5 for a sum of Rs. 2,000, becoming thereby, as the plaintiff describes it, 'rightless.' This Rs. 2,000 was not all paid in cash, but there was a provision and declaration in the *kabala* that out of this consideration money of Rs. 2,000, amongst other things, the sum of Rs. 330 due to the plaintiff should be paid by defendant No. 5. On the very same day there was an arrangement between the plaintiff and defendant No. 5 by which the liability of defendant No. 5 under the transfer was acknowledged and accepted, and either then or in connection therewith this *patta* was handed over to defendant No. 5."

It is clear that in all these cases the plaintiff had an "equity" which would always have been enforced by an English Court of Equity. The facts of the present case, as already pointed out, are quite different. We think the view taken by the learned Judge of this Court was correct and we dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 99.

CHAMIER AND PIGGOTT, JJ.

Rupan Singh—Defendant-Appellant

v.

Champa Lal and others—Plaintiffs-Respondents.

Second Appeal No. 1022 of 1913, decided on 19th November, 1914, from the decision of the Dist. J, Benares, dated 6th May, 1913.

Transfer of Property Act (IV of 1882). Ss. 51, 63 and 72—Usufructuary mortgagee constructing new room in place of old fallen one is entitled to be re-imbursed—Mortgagor not liable for additional upper storey.

A *kacha* one-storied house was usufructuarly mortgaged for Rs. 400. The mortgagee built a *pacca* room in place of a *kacha* room that had fallen down and over the new room he built a second storey and put up a *pacca* staircase to

communicate with the upper storey. The whole construction cost him about Rs. 300 :

Held, that the mortgagee was entitled to recover from the mortgagor the cost of the new room on the ground floor, as its construction was covered by S. 72 of the Transfer of Property Act. [P. 99, C. 2.]

Held, further that the mortgagee was not entitled to recover the cost of the upper storey and the staircase as they were built by him for his own convenience and comfort without any necessity and without the mortgagor's desire or consent. 16 I. C. 635 and *Shepard v. Jones* (1882) (21 Ch. D. 469, *Dist.* 19 Mad. 327 and 1883 A.W.N 203, *Ref.*) [P. 100, C. 1 & 2.]

Harnandan Prasad—for Appellant.

Lalit Mohan Banerjee—for Respondents.

Judgment :—This appeal arises out of a suit for redemption of a mortgage of a house in the city of Benares made to secure payment of a sum of Rs. 400. While in possession of the property, the mortgagee who is the appellant before us built a *pacca* room in place of a *kacha* room that had fallen down and over the new room he built a second storey and he put up a *pacca* staircase to communicate with the upper storey. The new ground floor room cost Rs. 147-6-0, the upper room cost Rs. 113 and the staircase cost Rs. 46-8-6. The mortgagee claims to be entitled to these three sums upon redemption of the mortgage, also to a small sum paid by him for taxes. The first Court disallowed the mortgagee's claim to these sums and gave the plaintiff-respondent a sum for redemption on payment of Rs. 400 only. On appeal the District Judge allowed the costs of the ground floor room but disallowed the other items. The mortgagee has appealed to this Court regarding the items disallowed and there is a cross-objection regarding the cost of the ground floor room.

Taking the cross-objection first we think that the District Judge was clearly right in allowing the cost of the new room on the ground floor, the original room had fallen down and the mortgagee was entitled to re-build it otherwise the house would have become uninhabitable. We think that this item is covered by S. 72, (b) of the Transfer of Property Act as an expense properly incurred for the preservation of the property. We cannot agree with the argument of the plaintiff-respondent that the mortgagee was bound to re-build the room with *kacha* materials. He was entitled to re-build it in a more substantial manner and so as to avoid

constant expense over repairs, and we do not think that the sum spent on the work is excessive.

The upper storey and staircase were built by the mortgagee for his own convenience and comfort without any necessity and without the mortgagor's desire or consent. They alter the whole character of the house and are certainly not covered by any of the provisions of S. 72 of the Transfer of Property Act. If regarded as accretions to the property acquired at the expense of the mortgagee, they were not necessary to preserve the property from destruction or made with the consent of the mortgagor and as they cannot be separated from the rest of the property without detriment to it, the mortgagor is not bound to pay the cost of them under S. 63 of the Act. The mortgagee contends that S. 63 is inapplicable and that apart from S. 72 or any other provision of the Act, he is entitled to be recouped the cost of the upper storey and staircase on the ground that they are lasting improvements reasonably made for the benefit of the property which added to the selling value thereof. He relies upon the decision of Banerji, J., in *Rahamatullah Beg v. Yusuf Ali* (1) in which he followed and applied the decision of the Court of Appeal in *Shepard v. Jones* (2). That was not a suit for redemption at all, but a suit for an account from a mortgagee, who had exercised his power of sale, of the application of the proceeds of that sale and what was allowed was a sum of Rs. 100 spent in deepening a well in premises used as a brewery and worth Rs. 5,000. What the Court actually held was that if the money was spent on what turned out on inquiry to be a lasting and permanent improvement and it was found that the value of the property had been enhanced to the extent of the money laid out, the mortgagor could not have the benefit of it without paying for the outlay. All the members of the Court lay stress on the consideration that not only must the improvement be lasting and permanent but the expenditure incurred must be reasonable. They throw no doubt whatever on the rule applied in many previous cases that mortgagor must not be improved out of his property. Assuming for the moment that we are entitled to go outside S. 72 of the Transfer of Property Act and apply the decision of

Shepard v. Jones (2) to their case, we find nothing in that decision which in any way helps the appellant-mortgagee. We think that the mortgagee had no right whatever to add an upper storey to the house for his own benefit and at the expense of the mortgagor and considering the value of the original house, we cannot hold that the expense incurred was reasonable. The principal sum secured was Rs. 400, but the mortgagee has claimed to be paid about Rs. 300 for additions, improvements, etc., made without any reference to the mortgagor. Nothing in the decision of Banerji, J., or of the Court of Appeal in the cases cited above justifies such a claim as this.

Further, we are of opinion that the claim made by the mortgagee cannot be allowed unless it comes within S. 72 of the Transfer of Property Act. That was the view taken by the Madras High Court in *Arunachella Chetty v. Sethayammal* (3), and in *Sammo v. Abdul Wahid* (4) this Court refused to allow a mortgagee the cost of additions to the mortgage property made without the consent of the mortgagor. It is not, however, clear that the latter case was governed by the Transfer of Property Act. The case of *Shepard v. Jones* (2) had not been decided by the Court of Appeal when the Transfer of Property Act was passed, but there were many other published decisions on the subject including the case of *Sandon v. Hooper* (5), which is referred to by Banerji, J., in the course of his judgment. Nothing is said in the Act about compensation for improvements and we think that the Legislature advisedly refrained from including in the Act any provision which would enable a mortgagee without consent of the mortgagor to add to and improve or alter the property. Such a power in the hand of the ordinary mortgagee in this country would obviously lead to much litigation and the Legislature was, we think, well advised in restricting the powers of the mortgagee within narrow limits.

The Court below refused to allow interest on the sum of Rs. 147-6-0 and omitted to deal with the claim on account of taxes paid by the mortgagee. We allow interest at the rate of 1 per cent. per mensem from

(1) () 16 I. C. 635.

(2) (1892) 21 Ch. D. 469=47 L. T. 604=
21 W. R. 308.

(3) (1896) 19 Mad. 327.

(4) (1883) 1883 A.W.N. 208.

(5) (1843) 6 Beav. 246=49 E. R. 820=12 L. J.
Ch. 809=63 R. R. 72.

April 20th, 1911, up to the date of redemption on the sum of Rs. 147 6-0 and by consent of the plaintiff-respondent, we allow a sum of Rs. 8-9-0 on account of taxes paid by the mortgagee. To this extent and as regards costs the appeal is allowed. The cross-objection is dismissed. The plaintiff-respondent and defendant-appellant will pay and receive proportionate costs throughout. Other parties will pay their own costs.

Appeal partly allowed.

A. I. R. 1915 Allahabad 101.

KNOX, J.

• *Emperor*—Prosecutor

v.

Abdul Razaak and another—Opposite Parties.

Criminal Ref. No. 37 of 1915, decided on 19th February, 1915, from the reference made by the Sessions Judge, Cawnpore, in letter No. 67/111, dated 9th February, 1915.

Criminal P. C. (V of 1898), S. 193 (2)—‘Cases’ do not include appeals—Sessions Judge cannot transfer appeals.

Section 193, Cl. 2 of the Code of Criminal Procedure, confers on the Sessions Judge no power to transfer appeals to the Assistant Sessions Judge. The word “case” in the section does not include an appeal. (7 All. 661; 9 Bom. 164 and 2 A. L. J. 576, *Ref.*)

[P. 101, C. 2 & P. 102, C. 1.]

Judgment:—By an order, dated the 3rd February, 1915, the Sessions Judge of Cawnpore transferred two Criminal Appeals Nos. 7 of 1915 and No. 14 of 1915 pending in his Court to the Court of the Assistant Sessions Judge for trial.

The section of the Code which he considered justified this procedure on his part was S. 193, Cl. 2. This section provides that Assistant Sessions Judges shall try such cases only as the Sessions Judge of the division by general or special order may make over to them for trial. In the opinion of the learned Sessions Judge the word “case” as used in this clause is not defined, and he saw no reason why it should be confined to cases and not extend to appeals or other matters.

• This Court has called for the records of the cases in question by the powers conferred upon it by S. 435 of the Code of Criminal Procedure. So far as I know

the word “case” has never been defined in any General Clauses Act or in the Code of Criminal Procedure, nor am I aware that this particular point has come up to this Court for decision.

In *Chattarpal Singh v. Raja Ram* (1), Mr. Justice Mahmud held that so far as the Code of Civil Procedure was concerned the word “case” should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or revision. With all due respect I think a safer rule is to consider the word in connection with the particular Code or law in which it is found. Under the present circumstances there is considerable difficulty in assigning to the word such a broad meaning. The first difficulty will be found in S. 409 of the Code of Criminal Procedure. That section deals with appeals. The right of appeal is a creation of Statute. Without some particular provision authorizing an appeal no right of appeal is conferred. Even when a right of appeal has been conferred, the Court to which such appeal lies must also be specified. A right of appeal without any specification as to the Court to which such appeal should be preferred would be a useless right.

The appeals with which we are concerned in the present case are appeals created by S. 408 of the Code of Criminal Procedure. That section provides for persons convicted on trials mentioned therein and wishing to appeal can appeal to the Court of Session. To find out what a Court of Session is, we have to turn to S. 9 of the Code of Criminal Procedure and a liberal interpretation of S. 9 might bring within the words “Court of Session” not only Sessions Judges but also the Additional Sessions Judge and the Assistant Sessions Judge, if there be any such within the Sessions division. If such an interpretation could be adopted it might, therefore, be argued that the words “Court of Session” in this S. 408 were wide enough to include all these officers. I pass over the anomaly in such an interpretation of the Court of the Assistant Sessions Judge being a Court from which appeals lie to the Court of Session. Section 409 by providing that an appeal shall lie to the Court of Session or Sessions Judge and shall be heard by

the Sessions Judge or by an Additional Sessions Judge, seems to make it clear that the Legislature intended that all appeals under the Code of Criminal Procedure lying to the Court of Session were to be heard only by the Sessions Judge or by an Additional Sessions Judge.

The Bombay High Court has had occasion to consider this question in more than one case. In the *petition of Musa Asmal* (2), they had to deal with a similar provision contained in Ss. 17 and 18 of Act X of 1872. Mr. Justice West held that S. 18 clearly was not meant to give a quasi-revisional power over the Magistrates of the District and at the same time no appellate jurisdiction. In a reference made by the Sessions Judge of Surat the same High Court held that a joint Sessions Judge could not try applications under Chap. 32 of the then current Code of Criminal Procedure. They endorsed the view stated by the Sessions Judge that the joint Sessions Judge was absolutely precluded from taking action under Chap. 32 of the Criminal Procedure Code, which relates to reference and revision.

There is another section in the present Code of Criminal Procedure which bears upon the point and that is S. 526. That section provides that the High Court can order "that any particular criminal case or appeal" be transferred from one Court to another. If the view taken by the learned Sessions Judge of Cawnpore be correct, the word "appeal" used in this section would be pure surplusage. But in S. 526 this phrase is used four times over and is again repeated in S. 527 of the Code of Criminal Procedure. It will be found that a view similar to this has been taken where the words "case" and "appeal" are to be found in other laws. I will mention only one, *Allah Dei Begam v. Kesri Mal* (3).

I entertain no doubt, therefore, that S. 193, Cl. 2, confers on the Sessions Judge no power to transfer appeals to the Assistant Sessions Judge.

I set aside the order passed as being an illegal order, and direct that the case of Abdul Razzak and Abdul Shakur be returned to the Sessions Court of Cawnpore for trial by the learned Sessions Judge or

by the Additional Sessions Judge of Cawnpore, if there be such a Judge in existence at the present time.

Order set aside.

A. I. R. 1915 Allahabad 102.

KNOX, J.

Pahlad Das and others—Plaintiffs—Applicants

v.

Collector of Jaunpur and others—Defendants—Opposite Parties.

Civil Revn. Petn. No. 117 of 1914, decided on 25th November, 1914, from the decision of the Sub-J., Benares, dated 7th February, 1914.

Civil P. C., (V of 1908), S. 115—Wrong calculation of pleader's fees in drawing up decree not objected—Application to amend decree after one year rejected—Order cannot be revised.

Where in the preparation of a decree two sets of Pleader's fee were erroneously charged instead of one, and an application for amendment made nearly after a year was refused :

Held, that the High Court could not interfere in revision, as it was very doubtful whether the error could properly be considered either as a clerical or an arithmetical mistake.

[P. 104, C. 1.]

Karlas Nath Katju—for Applicants.

E. A. Ryves, Jang Bahadur Lal and Kalindr Prasad—for Opposite Parties.

Judgment :—Pahlad Das, the plaintiff, had brought two suits in the Court of the Subordinate Judge of Benares. Another suit had been brought by Babu Girdhar Das. To all three suits the Collector of Jaunpur and certain other persons were made defendants. By consent of parties the suit which was fully heard out was Suit No. 90 of 1910 in which Babu Girdhar Das was plaintiff. Full judgment was recorded in that case by the Subordinate Judge of Benares, and in Suit No. 92 of 1910 he recorded the only order "For the reasons given in my judgment in Suit No. 90 of 1910 the suit is dismissed with costs. The other issues need not be tried." I am told by the learned Vakil for the applicant that the concluding words of this judgment refer to additional issues which were raised in this case only and not in the other two cases. This decision was passed on the 23rd of September, 1911. A decree was prepared and ap-

(1) (1885) 9 Bom. 164.

(3) (1905) 2 A. L. J. 576=(1905) A.W.N. 199.

parently no objection was taken to the minutes of the decree when they were drawn up as required by O. XX, R. 21, of the Code of Civil Procedure.* It is contended that into the decree thus prepared an error got in, namely, that in the schedule of costs drawn up two sets of Pleader's fees were charged, when only one set should have been charged if the rules prescribed by this Court for the guidance of subordinate Civil Courts in this matter

* RULES FRAMED BY THE HIGH COURT OF JUDICATURE, N.W.P., UNDER S. 122 OF THE CIVIL PROCEDURE CODE, ACT V OF 1908
ORDEK XX, RULE 21.

(1) Every decree and order as defined in S. 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up in the Court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the *munsarim* shall cause a notice to be posted on the notice board stating that the decree or order has been drawn up, and that any party or the Pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the *munsarim* an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the *munsarim* shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the *munsarim* shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rr. 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up and the *munsarim* shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rr. 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

had been followed. The special rules referred to by the learned Vakil for the applicant are Rr. 30 and 31 in Chap. XXI of the General Rules (Civil) of 1911.* It was not until the 17th of August, 1912, or nearly a year after that the applicant discovered what he considered to be an error and went to the Subordinate Judge of Benares and asked him to correct the decree and amend it by substituting only one set of Pleader's fees instead of two sets. The Subordinate Judge refused to amend the decree. The reasons he gives are that the record before him did not show whether the defendants in Suit No. 92 had succeeded on a joint defence or on separate defences. He held that it was the duty of the applicant to send for the record or to file a copy of the judgment in the case, namely, the judgment in Suit No. 90. He was not satisfied from what was before him that there was anything wrong about the decree and he refused the application to amend. It is contended before me that there is a manifest error in the decree. The defendants had on a joint and common defence succeeded and were entitled in law as provided in the judgment, only to one set of costs. This being so, the lower Court acted illegally and with material irregularity in refusing to amend the decree so as to bring it in accordance with the judgment. In support of his contention the learned Vakil referred me to the case of *Bajnath Prosad Singh v. Sham Sunder*

* GENERAL RULES (CIVIL) OF 1911 FOR CIVIL COURTS SUBORDINATE TO THE HIGH COURT OF JUDICATURE FOR THE N. W. P.

Chapter XXI, R. 30—If several defendants, who have a joint or common interest, succeed upon a joint defence, or upon separate defences substantially the same, not more than one fee shall be allowed, unless the Courts shall otherwise order for a reason which shall be recorded in the judgment. If only one fee be allowed, the Court shall direct to which of the defendants it shall be paid, or shall apportion it among the several defendants in such manner as the Court shall think fit.

Rule 31—If several defendants, who have separate interests, set up separate or distinct defences and succeed thereon, a fee for one legal practitioner for each of the defendants who shall appear by a separate legal practitioner may be allowed in respect of his separate interest. Such fee, if allowed shall be calculated with reference to the value of the separate interest of such defendant in the manner hereinbefore prescribed.

Kuer (1), also the case of *Sankuratri Timmayya v. Sri Rajah Uppalapati Venkata-vijaya Gopalaraaj Bahadur Zemindar Garu* (2), which is to be found in Indian Cases, Volume 24, page 878. In the latter case the error put forward for correction was a patent arithmetical error in the calculation of Vakil's fees. The Calcutta case is more on all fours with the case before me, and there is no doubt that the learned Judges of the Calcutta High Court did act in revision and did calculate the fees on a different scale from that which the Court below had given. I was also referred to the case of *Sheo Balak Pathak v. Sukhdei* (3), in which the orders given were that a clerical error should be amended throughout the record beginning with the plaint down to the decree. Apparently the error had run through the whole case. So far as I know O. XX, R. 21, is not to be found in the rules made under the Civil Procedure Code either by the Calcutta or the Madras High Court. It may be so but it has not been pointed out to me. It is a rule which is now part of the procedure enjoined by law. So far as the subordinate Courts are concerned O. XX, R. 21, gives a special and particular mode of procedure when a decree has been drawn up by which the accuracy of the decree may, as far as possible, be ensured. As I have already pointed out, the Pleader connected with the case did not follow the rules there laid down, but has now come in very nearly a year after he got the decree and asks that that decree may be amended. I am not in favour of exercising the powers of revision even if I have them in this direction. I am also very doubtful whether the present error can properly be considered either as a clerical or an arithmetical mistake. I decline to grant the application and I dismiss it. I make no order as to costs.

Application dismissed.

A. I. R. 1915 Allahabad 104.

RICHARDS, C.J. AND BANERJI, J.

Jagarnath Gir—Plaintiff-Appellant

v.

Tirguna Nand and others—Defendants-Respondents.

First Appeal No 270 of 1913, decided on 21st January, 1915, from the decision of the Dist. J., Benares, dated 24th April, 1913.

Specific Relief Act (I of 1877), S. 42—Property in possession of Court of Wards for person establishing his title—Suit under S. 42 lies against rival claimants.

Where the Court of Wards is in possession of a certain property on behalf of the person who might establish his title to it, a suit for declaration of title by a claimant as against several other claimants to the property is not barred by S. 42 of the Specific Relief Act. (20 All. 120, *Dist.*.)

Purushottam Das Tandon—for Appellant.

Kalindi Prasad—for Respondents.

Judgment:—This appeal arises out of a suit in which the plaintiff claimed a declaration that he was entitled to certain *mutt* property as the *mahant* thereof in succession to the last *mahant*. It appears that the last *mahant*, one Narain Gir, was a minor and that the property was taken over by the Court of Wards. After his death the plaintiff made claim as did certain other persons who are the defendants to the present suit. The Court of Wards, which is in possession of the property declined to hand over possession until some one should establish his title to the *mahantship*.

The lower Court without going into the merits has dismissed the plaintiff's suit upon two grounds, namely, that the Court of Wards was not made party to the suit and that the plaintiff did not claim possession.

It seems to us that the suit ought not to have been dismissed on either of these grounds. The Court of Wards made no claim to the property. If the Court of Wards wished to be made a party to the suit, it could apply to the Court to be made a party on its peril on the question of costs. If the Court below thought that the suit could not be disposed of without the Court of Wards being a party, it could, and in our opinion ought to, have exercised its jurisdiction in making the Court of

(1) (1914) 22 I.C. 402=41 Cal. 637.

(2) 24 I. C. 878.

(3) (1914) A. I. R. 1914 All. 61=23 I.C. 344.

Wards a party to the suit. We, however, think that it is highly probable in the present case that the Court of Wards will be perfectly satisfied with the decision of the Court in the present suit, and that it has no desire of any kind to be made a party to the proceedings.

On the second question we are of opinion that the possession of the Court of Wards is in trust for the person who shall establish his title to the *mahantship*. No one is entitled to get possession from the Court of Wards until such time as his title is established. Therefore the plaintiff was not entitled at the time he brought his suit to possession. We, therefore, think that S. 42 of the Specific Relief Act does not apply to the circumstances of the present case. As we have already pointed out, the Court of Wards does not deny the plaintiff's title but admits that it holds the property for the person legally entitled. The learned District Judge has referred to the case of *Goswami Ranchor Lalji v. Sri Girdhariji* (1). In our opinion this case has no bearing on the present case. The Court in that case, we think, rightly held that the plaintiff's proper remedy was by way of a suit for possession against the parties who dispossessed him. The suit being a suit for possession the period within which it could be brought was 12 years. This was the only matter which was discussed in the case.

We accordingly allow the appeal, set aside the decree of the Court below, and remand the case to that Court with directions to re-admit the suit under its original number in the file and to proceed to hear and determine the same on its merits. Costs here and heretofore will be costs in the cause.

The Collector as representing the Court of Wards may be informed of our judgment.

Appeal allowed;

Suit remanded.

A. I. R. 1915 Allahabad 105.

CHAMIER, J.

Kallan Singh and others—Decree-holders-Appellants

v.

Jagan Prasad—Judgment-debtor-Respondent.

First Appeal No. 261 of 1914, decided on 8th December, 1914, from the decision of the Sub-J., Muttra.

Civil P. C. (V of 1908), S. 11—Judgment-debtor failing to put forth some objections in execution is not barred by res judicata.

It is not necessary that a judgment-debtor who puts forward objections in the execution department must put forward all possible objections once and for all. If he does not do so, matters which he has omitted must not be treated as *res judicata* against him.

[P. 106, C. 1.]

Gulzari Lal—for Appellants.

Kailash Nath Katju—for Respondent.

Judgment:—This appeal arises out of proceedings in execution of a decree passed in 1911. The decree was for Rs. 20,200 with proportionate costs and the Court also gave the plaintiffs future interest, that is, interest from the date of suit at the rate of six per cent. per annum. The first question for decision is whether the Court allowed interest on the costs awarded. It appears to me that the decree read by itself is plain enough. The expression "*sud agenda*" is applicable to the principal sum decreed, and not to the sum awarded as costs, and if there is any doubt as to the meaning of the decree, it is set at rest by a reference to the judgment which makes the meaning quite plain. In my opinion the decree-holders were not entitled to interest on the amount of costs awarded. It appears that in 1912 an application was made to execute the decree and a report was put up which showed that a sum of Rs. 8,500 odd remained due. In November, 1912, some property was sold for the sum of Rs. 8,500, or deducting the sale commission, Rs. 8,479. Soon after the sale the judgment-debtor applied to the Court for refund of Rs. 125, saying that the decree-holders had been over-paid. It does not appear how he proposed to make out this, and the Court ultimately decided that the decree-holders had not been over-paid. By the present application for execution the decree-holders seek to recover Rs. 110-3-0, as balance of the

amount of the decree, Rs. 5-3-6, interest on the same from the date of the sale above-mentioned and Rs. 178-1-0, interest on the sum of Rs. 8,479, total Rs. 293-7-6. The judgment-debtor objected, saying that if accounts were taken it would be found that the decree-holders had been over-paid. On this occasion for the first time in the history of the case the judgment-debtor pointed out that all along interest had been calculated on the sum awarded as costs. According to my construction of the decree the decree-holders were not entitled to this interest. But it is contended that it is not open to the judgment-debtor to raise the question at this stage of the suit, but that he ought to have raised the question long ago and in particular he ought to have raised it in March, 1913, when he alleged that the decree-holders had been over-paid. In fact it is contended that the matter is now *res judicata* against him, because he might and ought on that occasion to have raised the question which he has now raised. It has been held in several cases that a matter once decided by a Court executing a decree cannot be re-opened at a subsequent stage of the proceedings; but I am not aware that it has been held that a judgment-debtor who puts forward objections in the execution department must put forward all possible objections once and for all, and that if he does not do so, matters which he has omitted must be treated as *res judicata* against him even if he was not aware of them. In the present case there has certainly been no decision on the question now raised and in the absence of authority I am not prepared to hold that the matter is *res judicata* against the judgment-debtor, because he had a previous opportunity of raising the question but did not do so. If, as I hold, interest ought not to have been allowed on the sum awarded as costs, and the judgment-debtor is entitled to raise objection at this stage, the decree-holders are certainly not entitled to the sum of Rs. 110-3-0, or to interest thereon. In any case they are not entitled to the sum of Rs. 178-1-0. They purchased the property themselves and, therefore, they paid no money into Court at all, and even if they had paid money into Court they would not have been entitled to interest on the sum paid in by them. I am, therefore, of opinion that the Court below was right in allowing judgment-debtor's objection. I do not understand the Court below to have held that

the judgment-debtor is entitled to a refund of any particular amount. All that it did was to allow his objections and to dismiss the application for execution. This appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 106.

CHAMIER AND PIGGOTT, JJ.

Anand Sarup and others—Plaintiffs-Appellants

v.

Asad Ali—Defendant-Respondent.

Letters Patent Appeal No. 102 of 1914, decided on 8th February, 1915 from the judgment of Richards, C.J., and Banerji, J., reported in A. I. R. 1914 All. 547.

Civil. P. C. (V of 1909), O. 41, R. 25—Lower Appellate Court finding mortgage not proved—High Court not entitled to remand to find if defendant in adverse possession.

Where the lower Appellate Court has found in a redemption case that the mortgage is not proved, a Judge of the High Court is not entitled to remit an issue to enquire whether the mortgagor has been in possession either personally or through others within 12 years.

[P. 107, C. 1.].

Gulzari Lal—for Appellants.

Abdul Raoof—for Respondent.

Judgment:—This is an appeal in a suit which has been repeatedly before this Court and has given rise to considerable differences of opinion. As was pointed out by Mr. Justice Tudball in the first instance, the trouble began with the framing of the plaint, and it is really doubtful whether a plaint such as this, seeking possession by redemption of an alleged mortgage against one set of defendants, and possession by ejectment of another set of defendants as mere trespassers, should have been allowed to come to trial. However, the actual point for decision is a narrow one. The respondent, *Syed Asad Ali*, is in possession of only a portion of the property originally in dispute with which we are now concerned. He has throughout put the plaintiffs to proof of their entire case. The plaintiffs said that the property in possession of *Syed Asad Ali* formed part of a larger property which had originally belonged to them and had been mortgaged with possession to another set of defendants. Their case was

that Syed Asad Ali had entered into possession as a trespasser by ousting the persons whom the plaintiffs call their mortgagees. On the pleadings the plaintiffs were bound to prove that they had a subsisting title against the defendant, Asad Ali. The original finding of the Appellate Court was that the plaintiffs had proved title to the whole of the property in dispute, but had not proved the mortgage set up by them or that the defendants whom they call their mortgagees had ever been in possession as such mortgagees. When the case was brought in second appeal before a single Judge of this Court an issue was remitted, asking for a definite finding as to whether the plaintiffs themselves, or any person holding through or on behalf of the plaintiffs, had been in possession of this particular part of the property in dispute within twelve years prior to the institution of the suit. The remanded issue came before a Judge other than the Judge who originally disposed of the appeal. On a perusal of the two judgments it would seem that the learned Judges were inclined to differ as to the facts of the case. The second Judge, however, felt himself unable to dissent from the finding of his predecessor against the existence or validity of the alleged mortgage. Accordingly he returned a finding couched in guarded language, to the effect that the persons whom the plaintiffs call their mortgagees had been in possession within limitation. The contention for the plaintiffs as appellants now before us is that this is a finding in their favour. Their case all along was that their possession within limitation had been through certain persons who were their mortgagees. There was no suggestion that these persons were in possession otherwise than as mortgagees of the plaintiffs. Practically, therefore, the finding that the possession of these so-called mortgagees was in reality the possession of the plaintiffs could only be arrived at by reversing the finding that these persons were not in possession as mortgagees of the plaintiffs. We think the view taken by the learned Chief Justice was right and that the plaintiffs have failed to prove their possession within limitation as against the defendant, Syed Asad Ali. One point in the case has, however, been overlooked in this Court. Syed Asad Ali is in possession of one half share only in the *parao* referred to in the judgment and decree of the lower Appellate Court. It was probably by an over-

sight that the learned District Judge, in the order by which he disposed of the appeal in his Court, directed that the decree of the first Court should be drawn up so as to make it clear that the *parao* was not included in the land covered by that decree. He should have said that one half share of the *parao* in possession of Syed Asad Ali was not so included. We must now order accordingly. Otherwise we dismiss this appeal. We make no order as to costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 107.

PIGGOTT, J.

Mt. Munni—Plaintiff-Appellant

v.

Madan Gopal—Defendant-Respondent.

Second Appeal No. 698 of 1913, decided on 5th January, 1915, from the decision of the Dist. J., Benares, dated 15th March, 1913.

(a) *Contract Act (IX of 1872), S. 11—Contract of sale with minor is void—No title passes to minor.*

A contract of sale negotiated by a minor, who settled the terms, paid consideration and received in return a deed purporting to convey immovable property by way of sale, is altogether void *ab initio* and no title thereby passes to the minor. (30 Cal. 539, (P.C.), *Foll. case-law Ref.*) [P. 109, C. 2.]

Obiter dicta:—(1) Under the provisions of S. 127 of the Transfer of Property Act a gift in favour of a minor is not void, though it may be voidable of the option of the minor.

[P. 108, C. 2.]

(b) *Interpretation—Distinction between contract and conveyance explained.*

(2) There is a fundamental distinction between a contract and a conveyance. A conveyance is a contract *plus* something more or, in other words, a conveyance by way of sale is either in itself a contract or at any rate involves or implies an antecedent contract. [P. 109, C. 2.]

S. M. Suleman—for Appellant.

A. P. Dube—for Respondent.

Judgment:—This case has had an unfortunate history. *Mt. Munni Kunwar*, the plaintiff, sued for recovery of possession over a certain house. Her case was that the defendant *Madan Gopal*, who was her father-in-law, conveyed the house in question to her by a sale-deed dated the 24th of September, 1901 and that she subsequently permitted him to reside in the same up to the year 1912. Being then desirous of occupying the house herself to

the exclusion of the defendant, she served the latter with a notice to vacate the house, and the cause of action is stated to have accrued to her on the 24th of February, 1912, the date of the defendant's refusal to vacate the house in accordance with the notice. The defendant replied that he had executed the sale-deed in suit in favour of his daughter-in-law without any consideration, as a colourable and fictitious transaction, and had remained in possession of the house ever since as proprietor. He alleged that his son Bishnath Singh, husband of the plaintiff, having subsequently died, the plaintiff had gone to live with her own father and was now bringing this suit in collusion with her father, although both of them were perfectly aware of the fictitious nature of the sale-deed of the 24th of September, 1901. The case went to trial upon a plain issue of fact as regards the alleged fictitious nature of the sale deed and the passing or otherwise of the consideration. At a very late stage of the case, it seems to have occurred to the learned Munsif that there was evidence on the face of the record to show that the plaintiff *Mt. Munni Kunwar* must have been a minor in the month of September 1901. He seems to have thought that this incident might furnish a short cut to the determination of the suit, without necessitating a trial of any of the questions of fact raised by the pleadings of the parties. He framed a fresh issue, and eventually dismissed the suit on the ground that, whatever may or may not have happened at the time of the execution of the sale-deed of 1901, the fact that the plaintiff was then a minor was conclusive against her. This decision was affirmed by the District Judge on appeal. When the matter came before me in June last, I found it necessary, for reasons which need not now be discussed, to remand the case in order that the plaintiff might have an opportunity of placing on the record certain evidence which had, in my opinion, been wrongly excluded at the trial in the Court of the Munsif. I asked the lower Appellate Court, after recording this evidence, to re-consider its decision in the light of that evidence, and to state whether the pleas taken in the first two paragraphs of the memorandum of appeal to the lower Appellate Court ought or ought not to prevail in the light of the evidence on the record taken as a whole. I am now inclined to think that, as I was remanding the case, I would have

exercised a wiser discretion if I had insisted on a clear finding of fact as to the passing of consideration and as to the alleged fictitious nature of the sale-deed. It appears that, when the plaintiff originally led evidence in the Munsif's Court, the fact that she was a minor in the year 1901 was not present to her mind or to that of her legal advisers. The case put forward by her was that the money which formed the consideration for the sale was a gift to her from her father, and that she had negotiated the sale and paid over to the defendant the money thus received by her as a gift. When the question of minority was raised, the plaintiff appears, as the learned District Judge has remarked, to have very distinctly shifted her ground. She then led evidence to prove that her father had negotiated on her behalf the transaction of sale with the defendant, had paid over the money to the defendant on her behalf and caused a sale-deed of the house to be executed in her name. If this were so in fact, the transaction would really amount to an acquisition by the plaintiff's father from the defendant of a certain house and a gift of that house to the plaintiff by her father. The provisions of S. 127 of the Transfer of Property Act (IV of 1882) show that a gift in favour of a minor is not void, though it may be voidable at the option of the minor. I should feel no hesitation in holding that, if the facts were as above stated, the present suit would be maintainable. As the case stands, the learned District Judge has definitely disbelieved and rejected the evidence tendered by the plaintiff subsequently to my order of remand. He holds that whatever else may have happened in connection with this contract of sale, it is not a fact that the sale was negotiated by the plaintiff's father and the purchase made by him on the plaintiff's behalf. I think it unfortunate that the Courts below should not have proceeded further and considered the effect of the plaintiff's change of attitude and the conflicting nature of the evidence tendered by her, with regard to the plain issues of fact raised by the pleadings as they originally stood. As the case stands I have no finding before me that consideration did or did not pass, or as to whether the execution of this sale deed of the 24th of September, 1901, was not after all, as the defendant has all along pleaded, a purely fictitious transaction. I have to look at the question of law raised in this

way: Assuming for the sake of argument that in the month of September, 1901, the plaintiff, being at the time a minor, negotiated the sale of the house in suit with the defendant and paid over certain money to the defendant receiving in return the sale-deed which is the basis of the present suit, is that contract of sale void on the ground of the plaintiff's minority, or can the plaintiff be said to have become by virtue of this transaction the owner of the house in suit? The leading cases on the subject are the recent decisions of their Lordships of the Privy Council in *Mohori Bibi v. Dharmodas Ghose* (1) and in *Mir Sarwarjan v. Fakhuruddin Mahomed* (2). The Madras High Court in *Novakoti Narayana Chetty v. Loyalinga Chetty* (3), has interpreted these rulings as laying down in the broadest terms the principle that a sale in favour of a minor is void. The reasoning of the learned Judges in arriving at this decision commends itself to my mind and I do not think it necessary to reproduce it here. It has been suggested that the current of decisions in this Court has always been in another direction from the time of the earliest case on the point, that of *Behari Lal v. Beni Lal* (4), in which a mortgage in favour of a minor was affirmed. Their Lordships of the Privy Council in *Mohori Bibi's* case (1) pointed out that there had been some conflict of decisions in the Indian Courts, and considered it necessary to review the whole question of a contract to which a minor was a party with reference to the special provisions of the Indian Contract Act (IX of 1872). Any rulings prior in date require to be reconsidered with reference to the principles laid down by the Privy Council. The nearest case in the plaintiff's favour is that of *Ulfat Rai v. Gouri Shankar* (5). It was there pointed out that the Transfer of Property Act in itself contains no provision which makes a minor incapable of being a transferee of immovable property. That case, however, required to be considered with reference to its own facts. The transfer was one by the minor's certificated guardian in favour of the minor. The transaction as a whole certainly admitted of being regarded as a gift subject to a

condition, and such transfer by way of gift would be voidable at the option of the minor under the provisions of the Transfer of Property Act, to which I have already referred. It is quite true, as has been pointed out by this Court in more than one case, [Vide *Rashik Lal v. Ram Narain* (6)], that there is a fundamental distinction between a contract and a conveyance but it seems to me that this point might be stated with equal accuracy by saying that a conveyance is a contract *plus* something more. At any rate, as the learned Judges of the Madras High Court have pointed out in the ruling already referred to, a conveyance by way of a sale either is in itself a contract or at any rate involves or implies an antecedent contract. On the principles laid down by their Lordships of the Privy Council in the cases already referred to, it seems to me impossible to avoid the conclusion that a contract of sale negotiated by a minor, the minor having settled the terms, paid consideration and received in return a deed purporting to convey immovable property by way of sale, is altogether void *ab initio*, and that no title thereby passed to the minor.

This suit as brought must, therefore, fail. It has been suggested that, in the alternative, the plaintiff should be given a decree for the refund of the purchase-money. I may remark at once that I could not do this without once more remanding the case to the Court below for a definite finding as to whether the alleged sale consideration did or did not pass from the plaintiff to the defendant. It seems to me, however, that from any point of view the claim is not one which can be entertained in the present suit. It was not expressly put forward in the plaint, and it is now sought to base it on the general prayer for any other relief, which is contained in the last paragraph of the plaint. If the plaintiff is regarded as claiming this refund of the sale consideration as money payable by the defendant for money received by the defendant for the plaintiff's use (Art. 62 of the first Schedule to the Limitation Act IX of 1908), then the claim is time-barred, because it does not appear to have been brought within three years from the plaintiff's attaining majority. For the same reason the claim cannot be sustained, as it perhaps might otherwise have been, as a claim for relief

(1) (1903) 30 Cal. 539=30 I.A. 114 (P.C.).

(2) (1912) 13 I.A. 331=39 Cal. 232=39 I.A. 1 (P.C.).

(3) (1909) 4 I.C. 383=33 Mad. 312.

(4) (1881) 3 All. 408.

(5) (1911) 11 I.C. 20=33 All. 657.

(6) (1912) 13 I.C. 573=34 All. 273.

on the ground of fraud. The only other suggestion which has been, or can be, put forward on behalf of the plaintiff is that the claim for refund of purchase-money might be sustained as a claim for money paid upon an existing consideration which afterwards fails. In that case Art. 97 of the Schedule already referred to would apply; but it would be for the plaintiff to show when it was that the consideration failed. There is authority in the case of *Amna Bibi v. Udit Narain Misra* (7) for giving the plaintiff in a case somewhat analogous to the present a decree for refund of the money paid, and for applying Art. 97 of the first Schedule to the Limitation Act to such a suit. In that case, however, as also in a similar case reported as *Venkatarama Aiyar v. Venkata Subrahmanian* (8), there had been a previous suit resulting in an adjudication between the parties in consequence of which the plaintiff had failed to obtain the property for the price of which he claimed in the second suit; limitation was held to run against the plaintiff from the date of the final decision in the first litigation holding the plaintiff's claim to the property to be unenforceable. If these principles are in fact applicable to the present case, it may be that the plaintiff will have a cause of action from the date of the dismissal of the present appeal; but that is not a matter as to which it is necessary for me to express a final opinion in order to dispose of this appeal. So far as this claim for refund of purchase-money goes, I hold that the plaintiff, supposing her to be in fact entitled to such refund, has either a cause of action which has become barred by time or a cause of action which has not yet arisen and will arise only on the failure of the present suit. For these reasons I dismiss this appeal with costs including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 110.

TUDBALL, J.

Zahir Singh—Applicant

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1228 of 1914, decided on 19th February, 1915, from the order of First Class Magistrate, Farrukhabad.

(a) *Criminal P. C. (V of 1898), Ss. 195 and 537—Absence of sanction under S. 195 is not cured by S. 537.*

Section 537 of the Code of Criminal Procedure was never intended to allow a Magistrate to override the clear provisions of the Code. The section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped all parties at the beginning of the trial. Where, therefore, the want of sanction for prosecution of a complaint is at once brought to the attention of the Court, it is the duty of the Magistrate to refuse to take cognizance of the complaint on the ground that he cannot do so by reason of the terms of S. 195 of the Code. [P. 111, C. 1.]

(b) *Criminal P. C. (V of 1898), S. 237—Complaint against several dismissed in default—Fresh complaint is not continuation.*

Sanction to prosecute Z and some other persons was granted under S. 195. On the basis of the sanction a complaint was filed but the accused were discharged as the complainant was not present on the date of hearing. A fresh complaint was filed against Z alone.

Held, that the second complaint was not in continuation of the first. [P. 111, C. 1.]

A. H. C. Hamilton—for Appellant.

R. Malcomson—for the Crown.

Judgment:—This application in revision arises out of the following facts. One Tika Ram obtained a sanction on March 3rd, 1913, to prosecute Zahir Singh and certain others for offences under Ss. 467 and 471 of the Indian Penal Code. An appeal was filed against the order granting sanction, which was dismissed on June 10th, 1913. On July 5th, 1913, Tika Ram filed a complaint against those three persons. Proceedings in the case were suspended pending the decision of an application in revision to this Court. That application was rejected on January 21st, 1914. Tika Ram then waited practically for four months until May 15th, 1914, when he went into Court and asked that his complaint might be taken up and decided. His application was granted and the case came up for hearing at the end of a

(7) (1909) 1 I. C. 890=31 All. 68=86 I. A. 44 (P.C.).

(8) (1901) 24 Mad. 27=10 M. L. J. 217.

little over three months on August 20th, 1914. Tika Ram did not appear and the accused were discharged. After the order of discharge had been made, Tika Ram filed a fresh complaint as against Zahir Singh only. Zahir Singh on this fresh complaint at once took objection that it was a complaint filed out of time and that the Magistrate could not take cognizance of the offence. The Magistrate disallowed this objection in the following words: "The first application was within time and by the subsequent application the continuity is not broken." In other words, he took this fresh complaint as being a proceeding in continuation of the former proceeding. This, however, was clearly wrong. It was clearly a fresh complaint as against Zahir Singh alone. If Tika Ram wished to continue the former proceeding he could have gone to the District Magistrate or the Sessions Judge and have obtained an order for further enquiry, on his first complaint. Zahir Singh has been committed for trial. The present application is directed to have that committal order quashed. On behalf of the Crown it is urged that the defect in the section is one which is cured by S. 537 of the Code of Criminal Procedure. That section lays down that subject to the provisions hereinbefore contained no order shall be reversed or altered in revision on account of want of any sanction required by S. 195, unless such want has in fact occasioned a failure of justice. The explanation attached to the section is that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether an objection could and should have been raised at an earlier stage of the proceeding. As has frequently been remarked in many cases, S. 537 is not perhaps happily worded. But to my mind one thing is clear, and that is that S. 537 was clearly never intended to allow a Magistrate to override the clear provisions of the Code. The section was intended to prevent a mere technicality from interfering with the course of justice, the error, omission, etc., being one which had escaped all parties at the beginning of the proceeding. Where, however, as in the present case, the want of sanction was at once brought to the attention of the Court, it was clearly the duty of the Magistrate to refuse to take cognizance of the complaint on the ground that he could not do so by reason of the terms of S. 195 of the

Code. To allow the present applicant to proceed to trial in the Court of Session would be grossly unfair, seeing that the trial must in the end fail by reason of the want of sanction. I, therefore, allow the application and set aside the order of the Court below. The applicant, if on bail, need not surrender; if in confinement, he will be released at once.

Application allowed.

A. I. R. 1915 Allahabad 111.

CHAMIER AND PIGGOTT, JJ.

Ram Dulari—Plaintiff-Appellant

v.

Balakram and another—Defendants-Respondents.

Second Appeal No. 134 of 1914, decided on 3rd December, 1914, from the decree of the Sub-J., Shahjahanpur.

Hindu Law — Joint family—Decree-holder attached undivided share—Partition decree declaring judgment-debtor's interest remained unexecuted — Auction-purchaser of co-parcener's share not entitled to separate possession.

B obtained a decree against S in execution of which he attached S's one-sixth share in a house. S meanwhile sued R and others for partition of the house and obtained a decree on the condition to pay Rs. 237 into Court. S did not pay the money and the decree remained unexecuted. B brought to sale and purchased the specific share allotted to S in the partition suit. B paid Rs. 237 into Court and obtained possession. R sued for declaration of her right and that B was not entitled to possession of the house by virtue of his purchase:

Held, that B was not entitled to separate possession of any specific portion of the house by virtue only of his purchase at the execution-sale, as what passed to him was the right, title and interest of S in an undivided one-sixth share. [P. 112, C. 1 & 2.]

S. C. Choudhri—for Appellant.

A. P. Dube—for Respondents.

Judgment :—The first respondent obtained in a Munsif's Court a decree against the second respondent in execution of which, some time before the end of March 1908, he attached the second respondent's one-sixth share in a house. In September, 1908 while the share was under attachment, she brought a suit in a Subordinate Judge's Court against the appellant and others for partition and separate possession of her share, and in March, 1909 she obtained a decree, which was subject to a condition that she should pay Rs. 237 into

Court. She has never paid in the money and consequently the decree has not been executed. In July, 1911 the first respondent brought to sale in execution of his decree and purchased himself the specific share allotted to the second respondent by the decree in the partition suit. In February 1912 he paid Rs. 237 into the Court of the Subordinate Judge and immediately afterwards he applied to the Munsif for delivery of possession of the specific share purchased by him. The appellant objected but her objection was disallowed, and she then brought the present suit claiming a declaration that she is owner and in possession of the house and that the first respondent is not entitled to obtain possession of the house by virtue of his purchase at the execution-sale. The first Court dismissed the suit on a ground that is clearly untenable. On appeal the District Judge confirmed the dismissal of the suit, upon the ground that although the second respondent was not entitled to a specific share in the house till she paid the sum of Rs. 237 into Court, and therefore no specific share passed to the first respondent at the execution-sale, yet the latter must have acquired the right, title and interest of *Mt. Sunder* and was entitled to stand in her shoes, and having paid the required sum into Court before execution of the decree became time-barred was entitled to execute the decree obtained by her. The appellant is obviously not entitled to the relief claimed in the plaint, for at the date of the suit she certainly was not the sole owner of the house and the first respondent had never attempted to get possession of the whole house, but the facts are all before us and we may properly give her such relief as she may be entitled to. It appears to us that what passed to the first respondent at the execution-sale was the right, title and interest of *Mt. Sunder* to and in an undivided one-sixth share, even though it may have been wrongly described as a specific or separate share in the house, and the first respondent was entitled to go to the Munsif and get himself placed in possession of the undivided share. It is not for us to decide whether before or after obtaining possession of the share in this way the first respondent was or is entitled to go to the Court of the Subordinate Judge and execute the decree obtained by *Mt. Sunder*. That is a matter for the Subordinate Judge to decide. It is quite clear that the first respondent was not, by virtue only of his purchase,

entitled to be placed by the Munsif in separate possession of that portion of the house which would have passed into the possession of *Mt. Sunder* if she had executed her decree, and we think that the appellant was and is entitled to a declaration that the first respondent is not entitled to separate possession of any specific portion of the house by virtue only of his purchase at the execution-sale. We allow the appeal and make a declaration to this effect. The parties will pay their own costs throughout.

Appeal allowed.

A. I. R. 1915 Allahabad 112.

RAFIQUE, J.

Chhajju—Defendant-Applicant

v.

Ayub Ahmad—Plaintiff-Opposite Party.

Civil Revn. Petn. No. 136 of 1914, decided on 8th January, 1915, from the decree of the Dist. J., Meerut, dated 16th May, 1914.

Evidence Act (I of 1872), S. 45—Appellate Court disbelieving the evidence of either party obtaining and deciding on thumb impression report—Held Procedure unwarranted.

In a suit on a promissory note an Appellate Court, not making up its mind to believe the witnesses of either party, sent the document which was the subject-matter of dispute to the Thumb Impression Bureau and on the receipt of the report of the said bureau proceeded to decide the appeal:

Held, that the procedure adopted by the Court was unwarranted by law.

S. D. Sinha—for Applicant.

M. L. Agarwala—for Opposite Party.

Judgment:—This is an application in revision from the decree of the Additional Judge of Meerut. It appears that the opposite party sued in the Court of the Munsif of Muzaffarnagar on the basis of a pro-note and the applicant denied the execution of the said pro-note. Both parties gave evidence and the Munsif disbelieving the evidence of the plaintiff opposite party dismissed his claim. On appeal the learned Additional Judge could not make up his mind as to which of the two sets of witnesses were to be believed. After hearing the argument in the appeal he sent the pro-note to the Thumb Impression Bureau at Allahabad and on receipt of the report of

the said bureau he accepted the appeal. It is said on behalf of the defendant-applicant that the procedure adopted by the learned Judge was unwarranted by law. I think that the contention for the applicant is correct. The learned Judge, if he wanted to take additional evidence, should have done so according to law. The decree of the lower Appellate Court is set aside. The learned Judge will dispose of the appeal according to law. Costs of this application are allowed to the applicant.

Decree set aside.

A. I. R. 1915 Allahabad 113.

CHAMBER, J.

Kalyan Singh—Defendant-Appellant

v.

Pitambar Singh and another—Plaintiffs-Respondents.

Second Appeal No. 218 of 1914, decided on 9th December, 1914, from the decision of the Dist. J., Budaun.

Limitation Act (IX of 1908), Arts. 144, 44 and 91—Suit by co-parcener to set aside sale by another and for possession is governed by Art. 144.

A suit to set aside a sale executed by one member of a joint Hindu family, and for possession of the property is governed by Art 144 of the Limitation Act and not by Art. 44 or 91. (9 I.C. 377, Ref.). [P. 114, C. 1.]

Benode Behari—for Appellant.

S. C. Banerji—for Respondents.

Judgment:—This appeal arises out of a suit brought by the respondents to set aside a sale, made by their brother Sardar Singh and their mother Kaunsilia, of a 16 *biswansi*, 13 *kachwansi*, 5 *nanwansi* share in a village and for possession of the property.

The share in question is part of a 1 *biswa*, 19 *biswansi*, 15 *kachwansi*, 4 *tanwansi*, 2 *nanwansi* share in the village, which was the joint property of the three brothers and their father, who died many years ago when all three brothers were minors. During their minority their mother Kaunsilia mortgaged a 1 *biswa*, 15 *biswansi*, 13 *kachwansi* share to one Raghunath Singh and placed him in possession. In 1895 after the eldest brother Sardar Singh had attained full age, he and his mother sold the share now in suit to the aforesaid Raghunath and a man named Subadar Singh. The mortgage-money was paid off out of the usufruct by June, 1909, and the

two purchasers then took possession as such of the share which they had purchased.

The present suit was instituted in August, 1912. The plaintiffs-respondents say that they did not get to know of the sale till August, 1911, and they suggest that the purchasers, who are represented in this suit by the appellant Kalyan and another, fraudulently concealed the fact of the sale from them.

It has been found by both Courts below that no legal necessity for the sale has been established by the purchasers' representatives. The only question for decision is whether the Courts below were right in holding that the suit was brought within time. It has been found, and it is now admitted, that both the plaintiffs-respondents attained majority more than three years before the suit. If, as contended by the appellant, Art. 44 of the first Schedule to the Limitation Act applies, then the suit is plainly barred by limitation unless the case is saved by S. 18 of the Act. Both Courts below have held that the suit is governed, not by Art. 44, but by Art. 144 and is within time, because the possession of the purchasers did not become adverse till 1909, when the mortgage was cleared off. The plaintiffs-respondents have treated the mortgage as binding upon them as they were entitled to do [see *Mata Din v. Ahmad Ali* (1)] and, therefore, possession of the purchasers did not become adverse to them till the mortgage was cleared off. If Art. 144 applies the suit is well within time.

I am unable to accept the contention that Art. 44 applies to this suit. When the sale was made, *Mt. Kaunsilia* was not guardian of the property of the plaintiffs-respondents [see *Gharibullah v. Khalak Singh* (2)]. The property was part of the joint family property of the plaintiffs and their brother, Sardar Singh. *Mt. Kaunsilia* must, I think, be disregarded altogether. She had no right whatever to deal with the property of the family after Sardar Singh came of age. Regarded as a sale by her alone, the sale was void altogether and Art. 44 does not apply to such a case [see *Sham Chandra Dafadar v. Gadadhar Mandal* (3)]. The sale should, I think, be regarded as having been made by Sardar Singh and

(1) (1912) 13 I. C. 976=34 All. 213=39 I. A. 49=15 O. C. 49 (P.C.).

(2) (1903) 25 All. 407=30 I. A. 165 (P.C.).

(3) (1911) 9 I. C. 377.

even if it be assumed that he was *karta* of the family, he was not guardian of the property of his brother within the meaning of Art. 44. This Article has never been applied to a suit to set aside a sale by a *karta* of joint family property. Nor, as far as I am aware, has Art. 91 ever been applied to such a case as this. It appears to me that the relevant Article is 144, that the prayer in the plaint that the sale may be set aside is probably superfluous and that the suit is well within time. The appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 114 (1)

RICHARDS, C. J. AND TUDBALL, J.
Mehdi Hassan—Defendant-Appellant

v.

Bacha Pande—Plaintiff-Respondent.

First Appeal No. 81 of 1914, decided on 13th March, 1915, from the order of Dist. J., Azamgarh, dated 18th March, 1914.

Limitation Act (IX of 1908), Art. 10—Suit by preferential pre-emptor against remote pre-emptor who had obtained decree is governed by Art. 10

A lease of some property was executed on 27th June, 1910. A remote pre-emptor brought a suit on the 31st of March, 1911 and obtained a decree on 18th of September, 1911. After the decree a preferential claimant brought a suit for pre-emption, against the defendant who had obtained the decree, on 31st May, 1912.

Held, that the suit was barred by limitation. (5 I. O. 527, Dist.) [P. 114, C. 2]

Safi-uz-zaman—for Appellant.

Naramadeshwar Prasad Upadhyay—for Respondent.

Facts:—A lease of certain property was executed on the 27th June, 1910. Mehdi Hasan brought a suit for pre-emption on the 31st of March, 1911, and obtained a decree on the 18th of September, 1911. After the decree Bacha Pande brought the present suit for pre-emption against Mehdi Hasan on the ground that he had a preferential rights to pre-empt. The first Court dismissed this suit as barred by limitation but the lower Appellate Court reversed the decision of the Court of first instance and remanded the suit. The defendant thereupon appealed to the High Court against the order of remand.

Judgment:—This appeal arises out of a suit for pre-emption. The alienation complained of was made on the 27th of

June, 1910 to a stranger. The appellant-defendant brought a suit on the 31st of March, 1911 and obtained a decree for pre-emption. The present suit was not instituted until the 31st of May, 1912, that is to say, long after limitation expired, in respect of the same alienation which gave rise to the alleged right of pre-emption. It is perfectly clear, therefore, that the present suit is barred by limitation. Reliance is placed upon the case of *Raj Naran Rai v. Dunya Pande* (1). The facts in that case were quite different. There the plaintiffs had brought the suit for pre-emption well within the year after the alienation had been made. It was true that in the meantime another party had got a decree. The Court held that the suit being within time and the plaintiff not being a party to the suit in which the decree for pre-emption had been made, the plaintiff was not bound by that decree. In our opinion the decree of the Court of first instance dismissing the plaintiff's claim was correct and ought to be restored. We allow the appeal, set aside the decree of the Court below and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

(1) (1910) 5 I. O 527=32 All. 340.

A. I. R. 1915 Allahabad 114 (2).

TUDBALL, J.

Emperor—Applicant

v.

Jiwan—Opposite party.

Criminal Revn. No. 952 of 1914, decided on 26th November, 1914, on reference by the S. J., Shahjahanpur.

(a) *Criminal P. C., (V of 1898), S. 403—Court trying case without sanction where sanction necessary is not competent Court.*

Where the law requires a previous sanction to be given before a charge can be entertained by a Court, that Court is not a Court of competent Jurisdiction until the sanction has been obtained.

(b) *Criminal P. C., (V of 1898), S. 235 (1) and S. 403 (4)—Acquittal of offence under S. 465 or 420, I P.C., on the same facts is no bar for trial under S. 82, Registration Act where former trial was without sanction and therefore Court was not competent.*

An accused was placed upon trial for aiding and abetting forgery in connection with a document presented for registration and was acquitted. He was then placed upon his trial for

aiding and abetting cheating in connection with the same transaction. He was convicted by the Magistrate but was acquitted on appeal. The District Registrar thereupon gave sanction for his trial for an offence under S. 82 of the Registration Act. He was committed to Sessions and the Sessions Judge made a reference to the High Court suggesting that S. 403 of the Criminal Procedure Code was a bar to his trial :

Held, that the former trial of the accused for the offence of aiding and abetting forgery was in no way a bar to his trial for an offence under the Registration Act, nor was his trial and acquittal of the offence of aiding and abetting the cheating a bar by reason of Cl. 4 of S. 403 of the Criminal Procedure Code as at the former trial the Court was not competent to charge with or convict or acquit of the offence with which he was subsequently charged by reason of the want of sanction. (22 Bom. 711, *Full.*)

[P. 115, C. 2.]

R. Malcomson—for the Crown.

Judgment:—This is a reference by the Sessions Judge of Shahjahanpur suggesting that the commitment of one Jiwan Kahar on a charge under S. 82 (a) of the Registration Act for trial in his Court be quashed. The facts are simple. One *Mt. Jhabbo* died. *Mt. Mulo* forged a lease of certain land in favour of her own sons, signing the name of *Mt. Jhabbo* thereto. She then went to the Registration office and personating *Mt. Jhabbo* presented the document for registration. *Jiwan Kahar* identified her as being *Mt. Jhabbo*. The document was registered and returned to *Mt. Mulo*. *Mt. Mulo* was placed upon her trial and convicted of the offence of forgery. She was also placed upon her trial and convicted of the offence of cheating the Sub-Registrar. *Jiwan* was placed upon his trial for aiding and abetting forgery. He was acquitted. He was then placed upon his trial for aiding and abetting cheating. He was convicted by the Magistrate, but acquitted on appeal. Thereupon the District Registrar gave sanction for his trial for an offence under S. 82 of the Registration Act. The Magistrate has now committed the case for trial, and hence the present reference. The learned Sessions Judge in a long order of reference suggests that under S. 403 the man cannot now be tried on the same facts for this offence under the Registration Act, because this was an offence for which he might have been charged (under S. 236 of the Criminal Procedure Code) and convicted (under S. 237) at his former trial. One point is quite clear that the former trial and acquittal of *Jiwan* for the offence of aiding and

abetting the forgery is in no way a bar to his trial for an offence under the Registration Act. The question is whether or not his trial and acquittal of the offence of aiding and abetting the cheating is a bar to the present trial. Where the law requires a previous sanction to be given before a charge can be entertained by a Court, that Court is not a Court of competent jurisdiction until the sanction has been obtained. This was held in *In re, Sams-ud-din* (1). At the former trial of *Jiwan* he could not have been charged with or convicted or acquitted of the offence with which he is now charged by reason of the want of sanction. Clause 4 of S. 403 lays down that a person acquitted of any offence constituted by any acts may, notwithstanding such acquittal, be subsequently charged with and tried for any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. Therefore, it is clear that *Jiwan* may now be tried for the offence under S. 82 of the Registration Act. I, therefore, cannot accept the reference and order the record to be returned. The Sessions Judge will proceed with the trial. He no doubt will take into consideration, if he finds the accused guilty, the fact that the man has already been subjected to two trials and has served a considerable period in jail.

Record returned.

(1) (1898) 22 Bom. 711.

A. I. R. 1915 Allahabad 115.

PIGGOTT, J.

Narain Sarup and others—Plaintiffs-Appellants

v.

Nanda—Defendant-Respondent.

Second Appeal No. 321 of 1914, decided on 30th January, 1915, from the decree of the Sub-J., Meerut.

Practice — Pleadings — Claim for ejectment decreed on defendant's failure to establish his tenancy in revenue court under S. 202 of Agra Tenancy Act—Appellate Court holding defendant tenant, for want of notice under S. 109, Transfer of Property Act reversed decree—Held appellate court erred in view of defendant's pleadings.

In an ejectment suit in the Civil Court, the defendant pleaded that he was an agricultural tenant of the plaintiff. The Munsif acting under S. 202 of Act II of 1901, asked the defendant to establish his plea in the Revenue Court within three months. The defendant failed to institute this suit within time in the Revenue Court. The suit was, therefore, decreed. The Appellate Court finding that the defendant was the tenant of the plaintiff and no notice of the termination of his tenancy had been given to him under S. 106 of the Transfer of Property Act dismissed the suit:

Held, that having regard to the pleading of the defendant in the first Court it was not open to the lower Appellate Court to find as it had done. [P. 116, C. 1 & 2.]

Mihal Chand—for Appellants.

Girdharilal Agarwala—for Respondent.

Judgment :—This is an appeal by the plaintiffs in a suit for ejectment. The defendant's reply was that the land had been leased to him, that he was holding on after the expiry of the lease and was doing so with the consent of the plaintiffs themselves, who had realized rent from him. He further expressly pleaded that, as the relationship of landlord and tenant is subsisting between the parties, the suit is not cognizable by a Civil Court. On this the Court of first instance took action under S. 202 of the Agra Tenancy Act (Local Act II of 1901). The defendant failed to institute any suit within the prescribed period of three months, for the determination of the question whether he was holding the land as tenant of the plaintiffs. On this the Court of first instance rejected the defendant's plea of tenancy, as it was bound to do, and decreed the plaintiffs' suit. In appeal an extraordinary plea was taken by the defendant, that he ought to have been given the benefit of S. 202 of Act II of 1901. The lower Appellate Court pointed out that the defendant had been given the benefit of this section, but had failed to institute a suit within the prescribed period. Nevertheless the learned Subordinate Judge has somehow arrived at the conclusion that the defendant was holding the land in question as tenant of the plaintiffs, and has dismissed the suit because the plaintiffs had failed to serve the defendant with a notice of the termination of his tenancy. I do not think this finding was open to the Court below in view of the provisions of S. 202, Cl. (2), already referred to. It has been sought to support the decision of the Court below, by a plea that the land in suit is not an agricultural holding and is not subject to the provisions of S. 202 aforesaid. This

plea is not open to the defendant, in view of the attitude taken by him in the Courts below. Whether the land in suit is or is not an agricultural holding is a plain question of fact. It is by no means concluded by the circumstance that this land, along with a larger area, was originally leased to the defendant for grazing purposes. The defendant said that it was an agricultural holding and that the suit to eject him from it was not cognizable by the Civil Court. In the lower Appellate Court he pleaded that the provisions of S. 202 of the Agra Tenancy Act did apply to this holding. It may be pointed out further that in this view of the case no question of notice under S. 106 of the Transfer of Property Act (Act IV of 1882) arises. The Act exempts leases for agricultural purposes from the provisions of Chap. V. I accept this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The plaintiffs will get their costs throughout.

Appeal allowed.

A. I. R. 1915 Allahabad 116.

PIGGOTT, J.

Jokhan Chaubey and others—Plaintiffs-Appellants

v.

Mahesh Singh and others—Defendants-Respondents.

Second Appeal No. 11 of 1913, decided on 4th January, 1915, from the decision of Dist J., Jaunpore.

(a) *Agra Tenancy Act (II of 1901), S. 22—Succession to rent free service tenure is governed by Hindu Law and not S. 22.*

Land held on a service tenure is a rent free grant, and its descent is governed by the ordinary Hindu Law of inheritance and not by S. 22 of the Agra Tenancy Act. [P. 117, C. 2.]

(b) *Practice—Pleading—Denial of being entitled to possession as service tenure is no bar to suit for recovery of land as service tenure holding.*

The mere fact that the plaintiffs did not admit themselves to be entitled to possession of the land in suit as a service tenure, should not disentitle them to a decree for recovery of possession of the land as a service tenure holding, provided that such right is established on the evidence. [P. 117, C. 2 & P. 118, C. 1.]

Durga Charan Banerji—for Appellants.

Gokul Prosad—for Respondents.

Judgment :—This was a suit for a declaration of title, or in the alternative fea-

recovery of possession, in respect of a certain plot of land, and also for damages with regard to a sugar-cane crop standing on the said land which is alleged to have been wrongfully removed by the defendants. The Court of first instance decreed the claim for damages and apparently intended to find for the plaintiffs on the question of title, but somewhat curiously remarked that it was unnecessary to give the plaintiffs any further relief inasmuch as the plaintiffs' Pleader had made a statement to the effect that his clients were actually in possession. The result naturally was that both parties appealed to the Court of the District Judge. That Court found against the plaintiffs on the question of title and also with regard to the claim for damages, it, therefore, dismissed their suit altogether. Inasmuch, however, as the learned District Judge had two appeals before him there have been two appeals filed by the plaintiffs before this Court. When this appeal came before me for hearing in the month of June last, I found it necessary to remit an issue to the lower Appellate Court. This issue came for decision before another learned Judge, not the one who decided the appeal in the first instance, and it is not altogether easy to reconcile the finding returned on the remanded issue with certain findings recorded by the learned Judge whose decree is now under appeal. It seems to me, however, that I am bound in second appeal to give effect as far as possible to the findings of fact originally recorded by the lower Appellate Court as well as to the finding returned upon the remanded issue. I take it accordingly to be established that the plot of land in suit was at one time held rent free by Puranwasi Hajjam upon a service tenure. The right enjoyed by him has since descended by inheritance, assuming that its descent is governed by the ordinary Hindu Law, to the plaintiffs Musai and Chaturi. Musai has mortgaged one-half share with possession to the plaintiff Jokhan Chaubey. These plaintiffs obtained possession over the plot in suit and were in possession at any rate during the years 1313, 1314 and 1315, *Fasli*, that is to say, for a period which came to an end in the month of September, 1908. Their possession was constructive, the land being in the actual occupation of their sub-tenant, Jita. I must take it that this sub-tenant was ejected by the defendants-respondents, who are *zemindars* of the village, somewhere about the end of the year 1908 A.D.

and that the sugar-cane crop in respect of which damages were claimed was actually grown by these defendants-respondents, or some of them. The plaintiffs Jokhan and Chaturi took formal proceedings in ejectment against Jita during the year 1909, obtained a decree against him, to which the present respondents were not parties, and were put in formal possession in the month of March, 1910, after having been made to pay to Jita Rs. 30, as compensation on account of the sugar-cane crop already mentioned. They have brought the present suit on the ground of interference on the part of the defendants-respondents with their right to actual possession. I must take it that their cause of action accrued after the close of the year 1315 *Musli*, that is to say, after the month of September, 1903.

The first question which has been argued before me to day is whether the plaintiffs Musai and Chaturi were in fact entitled to succeed to the rights of Puranwasi Hajjam, the rent-free holder of the land in suit. This involves the question whether succession to Puranwasi's right is governed by the ordinary Hindu Law or by the special provisions of S. 22 of the Tenancy Act (Act II of 1901). That section applies only to various classes of tenants, and by definition a tenant does not include a rent-free grantee, and a rent-free grantee does not include a person who holds land on a service tenure. I must, therefore, accept the finding of the lower Appellate Court on the remanded issue and hold that Puranwasi's right devolved in accordance with the ordinary Hindu Law, and, therefore, passed to the plaintiffs Chaturi and Musai. The present possession of the defendants-respondents, I must hold to have been violent and unlawful. It has been contended on their behalf, in the first place, that a service-tenure is in its essence non-transferable, so that the mortgage in favour of Jokhan is unlawful, and further, that the plaintiffs should in no case be given a decree for recovery of possession as service-tenure-holders, seeing that in their plaint the plaintiffs do not claim title as such but described the land in suit as forming a *haqiat mutfarrika*, whatever that expression may be understood to mean. I find that in the plaint the land in suit was described as ancestral *muafi* of Puranwasi Hajjam. I am not prepared to hold that the mere fact that the plaintiffs did not admit themselves to be entitled to possession of the land in suit as a

service-tenure, that is to say, subject to certain conditions of service, should disentitle them to a decree for recovery of possession as service-tenure-holders, provided that such right is established on the evidence. The question of the transfer in favour of Jokhan does not, in my opinion, affect the determination of the present suit. It applies in any case to one-half of the land in suit only. The transfer by way of mortgage would leave the original tenure-holders still liable for, and capable of rendering, the service subject to which the tenure was granted. In any case, even supposing that by reason of the transfer in favour of Jokhan, or of the devolution of Puranwasi's rights by inheritance through the female line, the *zemindars* of the village were no longer able or willing to receive from Musai and Chaturi, as tenure-holders the services for the sake of which the rent free holding was originally granted, that circumstance would not entitle them to enter into possession of the land in suit otherwise than by means of a suit for resumption. The rent-free-holders are, in my opinion, entitled to be re-instated in possession as such, because their right to such possession has not been terminated by the means provided by law. I am, therefore, of opinion that the plaintiffs are entitled to a decree for possession. I cannot give them a decree for damages in view of the finding recorded by the lower Appellate Court with regard to the sugarcane crop in dispute. That is a finding of fact and no valid ground has been shown for disturbing it in second appeal. The plaintiffs may have been unfortunate in this respect, in so far as it would appear that they were actually made liable to pay compensation for this crop to Jita; but that order was passed in a suit to which these defendant-respondents were not parties and is not binding upon them. The result is that I so far accept this appeal that I decree the plaintiffs' alternative claim for recovery of possession in respect of the land in suit, and dismiss the rest of their claim. The parties will pay and receive costs throughout in proportion to failure and success.

Decree modified.

A. I. R. 1915 Allahabad 118.

CHAMIER, J.

Mt. Fatima Bibi—Plaintiff-Applicant

v.

Mt. Hamida Bibi and others—Defendants-Respondents.

Civil Revn. Petn. No. 39 of 1914, decided on 16th March, 1915, against the order of Sm. C. Court J., Allahabad, dated 27th November, 1913.

Provincial Small Cause Courts Act (IX of 1887), Sch 2, Art. 41—Art. 41 bars suit for contribution from tenants in the same khata with plaintiff.

Where a decree for arrears of rent against several tenants occupying separate fields in one and the same *khata* has been realized from one of them, a suit for contribution as against others, at the instance of one who had paid the decree is barred by Art. 41 of the Provincial Small Cause Courts Act. [P. 118, C. 2 & 119 C. 1.]

Rahmat Ullah—for Applicant.

Baleshri Prasad for Lakshmi Narayan—for Respondents.

Facts :—Parties to the suit are tenants in one *khata* paying rent to the *zemindar* Sher Ali. There is no regular partition of fields, but for the sake of convenience parties are in possession of separate fields in the same *khata*. Sher Ali, *zemindar*, obtained a joint decree for arrears of rent against both plaintiff and defendants and realized the whole rent due under the decree from plaintiff only. The present suit was instituted by the plaintiff in the Court of Small Causes for contribution in respect of a payment made by her of rent due from the defendants. The defence among others was that the suit is barred by Art. 41, Schedule II, of the Provincial Small Cause Courts Act. The lower Court returned the plaint to the plaintiff for presentation to the proper Court.

The plaintiff applied in revision.

Judgment :—The parties to this suit are tenants of several fields included in one and the same *khata* and they pay a lump sum as rent to the *zemindar* for all the fields. The rent having been realized from the plaintiff alone, she has sued the rest of the tenants for contribution. The plaint has been returned by the Judge of the Small Cause Court, on the ground that cognizance of the suit is barred by Art. 41 of the second Schedule to the Provincial Small Cause Courts Act, as the suit is a suit for contribution by a sharer.

in joint property in respect of a payment made by him of money due from a co-sharer. It appears that the parties are all related to each other being descendants of the same person, and that they have for convenience sake allotted to each party a separate field or fields. It is contended that the allotment of fields shows that the property is no longer joint property. I cannot accept this contention. Certainly as regards the *zemindar* all the parties to this suit are jointly liable for the rent. There has been no division of the land between them. I cannot hold that the property has ceased to be joint property because for the sake of convenience each party cultivates separate fields. It appears that each party is liable for his share of the rent without regard to the actual area of the field. I hold that the Court below was right in deciding that the cognizance of this suit is barred by Art 41. This application is dismissed with costs.

Application dismissed.

A. I. R. 1915 Allahabad 119.

CHAMIER AND PIGGOTT, JJ.

Gur Baksh Singh—Applicant

v.

Kashi Ram and others—Opposite Parties.

Criminal Revn. No. 1027 of 1914, decided on 26th November, 1914, from an order of S. J., Farrukhabad.

Criminal P. C. (V of 1898), S. 537 (b)—Facts disclosing offence under S. 211 Penal Code—Conviction under S. 182, I.P.C.—Valid under S. 537 (b)—Conviction for minor offence where commission of graver offence doubtful is justifiable—Penal Code (XLV of 1860), Ss. 182 and 211.

A Sessions Judge is not justified in ignoring the provisions of S. 537, Cl. (b), of the Criminal Procedure Code in setting aside on appeal, without going into the merits of the case, a conviction for an offence under S. 182, Indian Penal Code, on the ground that the facts alleged disclosed the commission of an offence punishable under S. 211 of the Indian Penal Code, for which no sanction as required by the Code was taken. [P. 120, C. 1.]

It is perfectly legal to prosecute for the minor offence under S. 182, Indian Penal Code, when it is doubtful whether the facts alleged constitute a graver offence under S. 211, Indian Penal Code. [P. 120, C. 1.]

D. R. Sawhny—for Applicant.

E. A. Howard—for Opposite Parties.

Judgment:—This is an application for revision filed under somewhat peculiar circumstances. In the course of an inquiry in a case of dacoity, a statement was made to the investigating Police Officer implicating one Gur Baksh Singh. It appears that Gur Baksh Singh was arrested and remained for some period in custody. He was eventually released by the Police Officer concerned, on the ground that the investigation did not disclose evidence warranting his prosecution. Several persons implicated in the same dacoity were prosecuted to conviction. Gur Baksh Singh subsequently applied to the Superintendent of Police for sanction to prosecute Kashi Ram and Baldeo for having given false information to the investigating Police Officer to his injury and thereby committed an offence punishable under S. 182 of the Indian Penal Code. Sanction was given by the Superintendent of Police and Kashi Ram and Baldeo were prosecuted to conviction in the Court of a Magistrate of the first Class. They appealed to the Sessions Judge. The learned Sessions Judge formed an opinion that the facts alleged by Gur Baksh Singh disclosed the commission of an offence punishable under S. 211 of the Indian Penal Code, and presumably also held that, this being the case, it was not legal to prosecute Kashi Ram and Baldeo for the lesser offence. He held that there could be no conviction under S. 211 of the Indian Penal Code for want of sanction from the Court in which, or in relation to some proceedings in which, the offence, if any, had been committed. He accordingly set aside the conviction and sentence against the appellants before him, without going into the merits of the case or discussing the evidence in any way. An application for revision of this order has been filed by Gur Baksh Singh and we have entertained it. We treat this case as an exception to the general rule of practice by which this Court declines to entertain an application for revision against an order of acquittal presented by a private person.

The complaint made by Gur Baksh Singh is that Kashi Ram and Baldeo, the persons accused by him, have been acquitted and released without any trial of their appeals on the merits, and in reality without any finding that they either have or have not committed the offence under S. 182 of the Indian Penal Code, of which they had been convicted by the trying Magistrate. We are both of opinion

that the Sessions Judge was not justified in ignoring the provisions of S. 537, Cl. (b) of the Code of Criminal Procedure. There had been a conviction by a Court of competent jurisdiction and, if there was any question as to sanction, the provisions of S. 537 could have met the case. Apart from this, the conviction had actually been obtained in respect of an offence under S. 182 of the Indian Penal Code upon a prosecution based on a sanction granted by a competent authority. The Sessions Judge has in fact held that Gur Baksh Singh was not entitled to institute the prosecution for an offence under S. 182 of the Indian Penal Code upon facts which might perhaps also constitute a graver offence punishable by S. 211 of the Indian Penal Code. The question of the relation of these two sections *inter se* has been much debated. In the opinion of one of us, at any rate, Gur Baksh Singh was perfectly entitled to institute a prosecution for the minor offence only, more particularly as it is at least open to doubt whether the facts alleged would constitute an offence under S. 211 of the Indian Penal Code, whereas there can be no doubt that they fall within the purview of S. 182.

On these grounds we set aside the order of the Sessions Judge and send the record back to his Court, directing him to re-admit the appeals of Kashi Ram and Baldeo to the file of pending appeals and dispose of the same on the merits. We understand that the accused Kashi Ram and Baldeo have been released on bail. They should continue at large on the same security until the appeal itself has been properly disposed of.

Application allowed.

A. I. R. 1915 Allahabad 120 (1)

PIGGOTT, J.

Naurang and another—Applicants

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1078 of 1914, decided on 30th January, 1915, from the order of Addl. J., Meerut.

Penal Code (XLV of 1860), S. 498—Enticing with intention to re-marrying is offence under S. 498.

A person enticed away a married woman from her husband's house with intent that he might dispose of her in marriage to some one else. [P. 120, C. 2.]

Held, that he committed an offence under S. 498 of the Penal Code.

A. H. C. Hamilton—for Applicant.

R. Malcomson—for the Crown.

Judgment:—The point of law taken by this application is whether a person who entices away a married woman from her husband's house, with intent that he may dispose of her in marriage to some one else, has committed an offence under S. 498 of the Indian Penal Code. I hold in the affirmative, on the ground that sexual intercourse between the woman and any other person to whom she has thus been given in marriage, during the life-time of her husband, would be illicit intercourse within the meaning of the section in question. An examination of the record in this case suggests some doubt as to whether a more serious offence, falling under the abduction sections of the Indian Penal Code, was not committed; but under the circumstances, and in view of the fact that the applicants Naurang and Tota were re-tried after having been once discharged and that the sentence passed upon them is a fairly substantial one, I am not disposed to direct further action to be taken against them. I dismiss this application.

Application dismissed.

A. I. R. 1915 Allahabad 120 (2)

CHAMIER, J.

Bhagwant Datt and others—Decree-holders-Appellants

v.

Rajab Chowdhury and another—Judgment-debtors-Respondents.

Ex-Second Appeal No. 1171 of 1914, decided on 13th January, 1915, from the decision of the Addl. J., Gorakhpur.

Jurisdiction—Appellate Court's decree against defendants not parties to appeal is ultra vires.

A decree passed by the appellate Court against the defendants who were not parties to the appeal, cannot be executed against them.

S. N. Sen—for Appellants.

S. M. Sulaiman—for Respondents.

Judgment:—The facts of this case are very simple. The appellants brought a suit against two sets of defendants. The Court of first instance dismissed the suit against the first set, but decreed it against the second set. The latter appealed making the appellants only parties as respondents.

The Appellate Court found that the second set of defendants were not liable for the claim, allowed the appeal and dismissed the suit against them. It went on, however, apparently *per incuriam* to say that it passed a decree against the first set of defendants. The appellants now seek to execute the decree against the first set of defendants, who object on the ground that they were not parties to the decree sought to be executed. The Munsif threw out the objection on the ground that it is not open to a Court executing a decree to challenge it in any way. On appeal the Subordinate Judge allowed the objection and dismissed the application for execution. It appears to me that the view taken by the Subordinate Judge is correct. It is true that this Court has frequently held that a Court executing a decree is not entitled to challenge the correctness of it, and that it has been held in some cases that such a Court cannot even inquire whether the Court which passed the decree had jurisdiction to do so, but it appears to me that the present case stands on an entirely different footing from any of those to which reference has been made. In the present case though the Appellate Court said "I pass a decree against the first set of defendants," it took no steps towards giving effect to its decision. It did not make those defendants parties to the appeal as it might have done, and in the decree, as prepared, the names of the first set of defendants do not appear at all. In my opinion the appellants are not entitled to take out execution against the first set of defendants. I dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 121.

RICHARDS, C. J. AND BANERJEE, J.

Mst. Munna Kunwar—Plaintiff-Appellant

v.

Venaik Ram and another—Defendants-Respondents.

First Appeal No. 190 of 1913, decided on 8th March, 1915, from the decision of the Sub-J., Benares, dated 24th November, 1913.

Guardians and Wards Act (VIII of 1890), S. 29—Purchase by guardian of minor's property in lieu of debts is held in trust for minor.

Where a decree, passed in favour of a minor under the guardianship of a certain person, is discharged by the guardian in consideration of the transfer made to him of certain property, he holds that property as the trustee for the minor. [P. 122, C. 1.]

S. C. Banerjee—for Appellant.

Sunder Lal and Rama Kant Malaviya—for Respondents.

Facts:—Daya Ram and Mangal Ram were cousins. After Daya Ram's death on July 18th, 1888, his cousin, Mangal Ram obtained a certificate of guardianship of the two minor daughters of Daya Ram on 13th March, 1890. There were some *hundis* left by Daya Ram, in which his share was $\frac{1}{3}$ rd, Mangal Ram and Uadho Ram held $\frac{1}{3}$ rd share and Adit Ram $\frac{1}{3}$ rd. A suit was brought by Adit Ram, Mangal Ram, Madho Ram and the plaintiff and *Mt. Hari Kunwar*, her sister, under the guardianship of Mangal Ram. The latter's daughter died and only the plaintiff represented her in the suit.

A decree was obtained and in satisfaction of the decree the judgment-debtors conveyed the property in dispute under two sale-deeds of 20th December, 1898 and 17th September, 1897. The sale-deeds were in the name of Adit Ram, Madho Ram and Mangal Ram.

The plaintiff attained majority on 27th September, 1901, and brought this suit for possession, on the allegation that Mangal Ram held the property as her trustee and as her guardian, and that he died in 1902 and his sons also held the same position, but refused to pay her profits now. The defendants denied their possession as that of trustees and pleaded that the suit was time-barred. The Subordinate Judge dismissed the suit. Plaintiff appealed.

Judgment:—This appeal arises out of a suit in which the plaintiff claims to be put into proprietary possession of one-third of certain property together with an account of what was due to her whilst she was wrongfully kept out of possession, and to be awarded the amount so found due. The main facts relevant to the present appeal are admitted. A decree was made on the 29th of February, 1892 in favour of one Adit Ram, son of Fateh Ram, Mangal Ram and Madho Ram, sons of Gulab Ram, and *Mt. Munna Kunwar* (daughter of Daya Ram) under the guardianship of the aforesaid Mangal Ram. In part discharge of this decree certain

properties were purchased but in the names only of Mangal Ram, Adit Ram and Madho Ram. The plaintiff says that she was entitled to one-third of the decree and that therefore the decree having been discharged in part by the transfer of the property, she is entitled to the property to the extent of her interest in the decree and that Mangal Ram, who was her guardian, must be deemed to have held the property to the extent of one-third as trustee for her. Numerous defences were pleaded, including a plea that the claim of *Mt. Munna Kunwar* under the decree had been discharged and that she had been paid off, and a further plea of limitation. The Court below without deciding any of the other issues has dismissed the suit as being barred by time.

We are clearly of opinion that if Mangal Ram, who was the guardian of Munna Kunwar in this very decree, gave a discharge for the decree in whole or in part in consideration of the transfer to him of certain property, he would hold that property as the trustee for Munna Kunwar to the extent of her interest. It is doubtful whether time would run at all in favour of Mangal Ram, or his representatives, but certainly time would not commence to run until after *Mt. Munna Kunwar* attained majority. Mangal Ram undoubtedly was in a fiduciary capacity towards Munna Kunwar. We, therefore, think that the Court below was wrong in holding that the suit was barred by limitation. Munna Kunwar did not attain her majority until the 27th of September, 1901, and the suit was instituted on the 23rd of September, 1911. We wish it to be understood that we are not expressing any opinion on the other issues.

We allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to readmit the case under its original number in the file and to proceed to hear and determine the same according to law. The appellant must have the costs of this appeal, which will include in this Court-fee on the higher scale. Other costs will be costs in the cause.

Appeal allowed ; Case remanded.

A. I. R. 1915 Allahabad 122.

CHAMIER, J.

Chatar Palman and another—Judgment-debtors-Appellants

v.

Prem Nath Tewari and another—Decree-holders Respondents.

Ex. Second Appeal No. 1150 of 1914, decided on 13th January, 1915, from the decision of the Sub-J., Gorakhpur, dated 30th April, 1904.

Civil P. C. (V of 1908), S. 48—S. 6 of Limitation Act does not extend period fixed by S. 48, Civil P. C.—Limitation Act (IX of 1908), S. 6.

Section 6 of the Limitation Act, 1909, serves only to extend, for the benefit of minors, periods of limitation provided by the Act itself, it does not extend the period of limitation provided by S. 48 of the Code of Civil Procedure, 1908. (128 P. R. 1894 and 18 I C. 586, App. of and 16 Bom. 536, Not app. of) [P. 123, C. 1.]

G. L. Agarwala—for Appellants.

Iswar Saran—for Respondents.

Judgment:—This appeal arises out of proceedings taken to execute a decree obtained on May 22nd, 1901, by the respondents, who were at the time and still are minors. Their guardian made several applications for execution of the decree which were granted, the last of them being made on February 6th, 1912, and ultimately dismissed on December 3rd, 1912. The present application was presented on May 27th, 1913, i.e., a few days after the expiration of 12 years from the date of the decree. One of the grounds on which the application was contested, and the only ground with which we are concerned now was that further execution of the decree is barred by S. 48 of the Code of Civil Procedure. The Munsif decided this question in favour of the judgment-debtors-appellants but the Additional Subordinate Judge decided it against them, following the decision of the Bombay High Court in *Moro Sadashiv v. Visaji Raghunath* (1). In the case cited the Bombay High Court pointed out that S. 7 of the Limitation Act of 1877 served only to extend, for the benefit of minors, periods of limitation provided by that Act, but they held that S. 230 of the Code of Civil Procedure must give way to the general principle that time does not run against a minor. In *Jhandu v. Mohan Lal* (2), the

(1) (1892) 16 Bom 536.

(2) (1894) 128 P.R. 1894.

Punjab Chief Court declined to follow the decision of the Bombay High Court and quite recently in *Ramana Reddi v. Babu Reddi* (3), in a case arising under S. 6 of the Limitation Act of 1908 and S. 48 of the Code of Civil Procedure of 1908, the Madras High Court followed the Punjab decision and declined to follow that of the Bombay High Court. I prefer the view taken by the Punjab and Madras Courts. Section 6 of the present Limitation Act, like S. 7 of the Limitation Act of 1877, serves only to extend, for the benefit of minors, periods of limitation provided by the Act itself, indeed strictly speaking it refers only to periods of limitation prescribed by the first Schedule to the Act. Section 48 of the present Code of Civil Procedure, like S. 230 of the Code of 1882, recognizes certain exceptions to the general rule which it lays down, but it makes no exception in favour of minors. I know of no general law, apart from S. 6 of the Limitation Act, which lays down that minority is a ground of exemption from the operation of the Law of Limitation. As Sir Meredyth Plowden said in the Punjab case, the present question may be a *casus omissus*, but if so, it is the business of the Legislature, not of the Courts, to provide for it. Apart from the actual wording of S. 6 of the Limitation Act there are great difficulties in engrafting on S. 48 of the Code of Civil Procedure the rule laid down in the Limitation Act. If any extension of the period of 12 years is to be allowed, how much is to be allowed and from what date is the extension to be calculated? An extension of three years only will not meet all cases and yet the Limitation Act does not allow an extension of more than three years after the minor attains his majority. It appears to me that it would be pure legislation to hold that S. 48 of the Code of Civil Procedure does not apply to this case or to hold that minors, situated as the present respondents are, can claim an extension of the period prescribed by it sufficient to enable them to take out execution after they attain their majority.

For the reasons given by the lower Appellate Court it is impossible to hold that the present application for execution is one to restore or revive the last previous application. Indeed the respondents put forward no such contention before me.

In my opinion the respondents' present application for execution should have been dismissed. I allow this appeal, reverse the decision of the lower Appellate Court and restore the order of the first Court dismissing the application. The respondents will pay the appellants' costs in all three Courts.

Appeal allowed.

A. I. R. 1915 Allahabad 123.

CHAMIER AND PIGGOTT, JJ.

Mst. Afzal Begam—Defendant-Applicant

v.

Mst. Akhari Khanam and others—Plaintiffs Respondents.

Civil Revn. Petn. No. 157 of 1914, decided on 10th March, 1915, from an order of the Dist. J., Bareilly, dated 7th August, 1914.

Civil P. C. (V of 1908), O. 23, R. 1 (2)—Powers can be exercised by appellate Court.

An appellate Court can under O. XXIII of the Civil Procedure Code give a plaintiff permission to withdraw his suit with liberty to bring a fresh one. (8 All. 82, *Foll.*; 25 I.C. 388, 10 I.C. 813, *Not foll.*.)

S. M. Suleman—for Applicant.

Agha Haidar—for Respondents.

Judgment :—This is an application for revision of an order passed by the District Judge of Bareilly under O. XXIII, R. 1 (2), allowing the plaintiff to withdraw from the suit and giving her liberty to institute a fresh suit in respect of the same subject-matter. It is contended that the learned Judge had no power to act under this rule because it is only the Court of first instance that can allow the plaintiff to withdraw the suit and give him or her permission to institute a fresh suit. The applicant relies upon the decision of the Madras High Court in *Choragudi Chinna Kotayya v. Sri Raja Varadaraja Appa Row Bahadur* (1) and the decision of the Bombay High Court in *Elknath v. Ranoji* (2). These two decisions certainly support the contention advanced on behalf of the applicant; but as long ago as 1885 this Court in *Ganga Ram v. Data Ram* (3) decided

(1) (1914) 25 I.C. 388.

(2) (1911) 10 I.C. 813=35 Bom. 261.

(3) (1886) 8 All. 82=1886 A.W.N. 8.

that an Appellate Court could, under S. 373 of the Code of Civil Procedure, 1882, give a plaintiff, whose suit had been dismissed by the Court of first instance, permission to withdraw his suit and give him leave to institute a fresh one. The decision in that case was based on some earlier decisions of the Calcutta High Court under the corresponding provision in the Code of Civil Procedure, 1859. So far as we are aware the correctness of the decision of this Court has never been challenged in this Court and we believe that when the new Code of Civil Procedure was passed, there was no reported decision to the effect that the Appellate Court could not give such permission. All the reported cases were in favour of the view that the Appellate Court could give such permission. Indeed Courts had gone further and held that a Court executing a decree could give such permission. Order XXIII, R. 4, distinctly lays down that nothing in the order shall apply to any proceedings in execution of a decree or order, thereby superseding the decision that a Court executing a decree could give such permission. The language of O. XXIII, R. 1, is not exactly the same as that of S. 373 of the Code of Civil Procedure of 1882. The provisions of the enactment have been re arranged ; but we do not think that the re-arrangement indicates any intention to lay down that an Appellate Court is not to give such permission. We do not think that sufficient ground has been shown for departing from the long continued practice of this Province founded upon the decision of this Court in *Ganga Ram v. Data Ram* (3). A good deal may, no doubt, be said against the view taken by this Court; but the ruling has stood unchallenged for many years and we shall only introduce confusion if we depart from it now. There are several reported cases in which the lower Appellate Court has given the plaintiff permission to withdraw from the suit and file a fresh suit and such orders have been attacked on various grounds, but so far as we know it has never been contended here since 1885 that an appellate Court has not power to grant such permission ; we propose to adhere to the decision of this Court. Then it is contended that even if the District Judge had jurisdiction to act under O. XXIII, R. 1, he has exercised his jurisdiction in an unreasonable way, that he has not found that the

suit would fail on account of a formal defect and that the ground given by the District Judge is really no ground for allowing the plaintiff to withdraw from the suit. The suit was one for partition of property which originally belonged to one Moti Begam. One of the children of Moti Begam was Kamini Begam who was married to a man named Khadim Ali. Several members of the family were impleaded as defendants to the suit, but the heirs of Khadim Ali, who was dead, were not impleaded. In her written statement the first defendant to the suit distinctly pleaded that as Khadim Ali's heirs were not parties to the suit, the suit could not proceed. This plea appears to have escaped the attention of the Subordinate Judge when he was fixing issues, with the result that no specific issue was fixed regarding it. But at the time of argument the Subordinate Judge was asked to decide behind the back of Khadim Ali's heirs that they had no right to the estate. He declined to do this, but set apart what he conceived to be Khadim Ali's share and gave the plaintiff a decree for partition of her share in the remainder of the property. The plaintiff appealed contending that her entire claim should have been decreed. The first defendant filed cross-objections, one of which was that all the necessary parties had not been impleaded and that the suit should have been dismissed. Thereupon the plaintiff presented a petition to the District Judge saying that it was by mistake that she had failed to implead the heirs of Khadim Ali, that the first defendant had pleaded that the suit could not proceed in their absence and had reiterated this objection in her memorandum of objections in the appellate Court and that she was afraid that her suit and appeal would be dismissed on this ground ; she, therefore, prayed for permission to withdraw from the suit and bring another suit. The District Judge rightly or wrongly held that as the suit was one for partition, non-joinder of necessary parties might result in its being dismissed and he pointed out that a complete partition of the property could not be effected in the absence of Khadim Ali's heirs and he came to the conclusion that a fair ground has been made out for allowing the plaintiff to withdraw from the suit. It may be that we should not have taken the same view as the District Judge took of the non-joinder of Khadim Ali's heirs. It

might have been possible to hold that the suit could proceed in their absence so far as the rest of the property was concerned; but this is not an appeal and it seems to us impossible to say that the District Judge in arriving at his decision that permission to withdraw the suit should be given to the plaintiff has acted illegally or with material irregularity. We are, therefore, unable to interfere with the decision of the District Judge. We dismiss this application with costs including fees on the higher scale.

Application dismissed.

A.I. R. 1915 Allahabad 125.

PIGGOTT, J.

Chainsukh and another—Applicants

v.

Emperor—Opposite Party.

Criminal Revn Petn. No. 1071 of 1914, decided on 28th January, 1915, from the order of the S. J., Agra.

Evidence Act (I of 1872), S. 32—Statements to police officer are not admissible unless they are evidence about general repute.

A statement by a Police officer to the effect that certain persons made certain statements to him is not admissible in evidence unless it is evidence of general repute.

A. P. Dube—for Applicants.

Asst. Govt. Advocate—for the Crown.

Judgment :—Chainsukh and Hukmi, father and son, residents of a village in the Agra District, were prosecuted before a Magistrate of the first class on the allegation that they habitually committed the offence of counterfeiting coins. The Magistrate after a full inquiry passed an order requiring them to file security for a period of two years. As the security was not furnished, the Magistrate referred the matter to the Sessions Judge. The Sessions Judge has passed an order requiring security to be furnished as directed by the Magistrate, and sentencing both men to rigorous imprisonment for a period of two years in default of furnishing the said security. The order of the Sessions Judge is challenged in revision, substantially on the ground that it is based upon inadmissible evidence. I have examined the record, and I am satisfied that the applicants have made good their plea. At the outset of the Sessions Judge's order I find

the following passages : "The search of the house of Hukmi led to the finding of nothing criminating except a telegram from Chiranji's brother. Under the circumstances in which this telegram was found I consider it a strong piece of evidence in corroboration of Chiranji's statement that Hukmi was his associate and the coiner of the counterfeit coin in his possession. In another recent case Badri and Dwarka also mentioned the name of Hukmi as being their accomplice." There is no legal evidence on the record that Chiranji or Badri or Dwarka made the statements relied on by the Sessions Judge. They were not called as witnesses in the case. The statements relied on by the Sessions Judge are statements by Police officers to the effect that Chiranji, Badri or Dwarka made certain statements to them. This is not evidence of general repute, and is not admissible under any provision of the Indian Evidence Act or of the Code of Criminal Procedure. The remark about the finding of the telegram is open even to equal objection. There is no telegram on the record alleged to have been found in Hukmi's house, nor is there anything on the record to show what were the terms of the telegram which the Sub-Inspector Ashiq Ali (P. W. No. 2) says he found. If the telegram in question was an exhibit of importance in the case, it should have been proved. The Court might then have considered its terms and considered further whether it was prepared to presume without any direct evidence, that it was actually despatched by the person from whom it purported to come, and that that person was Chiranji's brother. The passages I have quoted from the order of the learned Sessions Judge are obviously material to the conclusion arrived at by that Court. The comments which I have made on them are sufficient to show that his order cannot be affirmed as it stands. I have examined the record in some detail in order to see whether I should merely quash the proceedings or direct any further proceedings to be taken. The record seems to me to be saturated with evidence not legally admissible, and I am quite unable to concur with the Magistrate or the Sessions Judge as to the evidential value of the statements made by five Police officers, who have been relied on as proving that Chainsukh and Hukmi are by general repute habitual counterfeiters of coin. They appear to have been prosecuted on one occasion only, when they were

convicted of a technical offence for which an almost nominal sentence was considered sufficient. The fact of this conviction, however, might account for the diffusion of the rumours unfavourable to the character of the persons so convicted. It would certainly serve to account for information unfavourable to their character reaching the Police officers. Any person caught with counterfeit coin in his possession, and desirous of concealing the real source from which it came, would find it easy to say that it proceeded from Chainsukh and Hukmi who had already been convicted in another case. I accept this application and set aside the order of the Sessions Judge. If the applicants are in custody, they must be released. If they have furnished security, their bonds and those of their sureties are hereby discharged.

Order set aside.

A. I. R. 1915 Allahabad 126.

TUDBALL AND PIGGOTT, JJ.

Indar Pal and another—Objectors-Appellants

v.

Imperial Bank—Decree-holder-Respondent.

First Appeal No. 239 of 1914, decided on 19th January, 1915, from the order of the 1st Addl. Dist. J., Aligarh.

(a) *Hindu Law—Debt—Son impleaded but subsequently released—Decree against father alone—Creditor's position in execution not affected by impleading son.*

Where a son is impleaded as a party to a suit brought upon a promissory note executed by his father, but subsequently the claim as against him was withdrawn and the decree is passed against the father alone, the creditor cannot be put in a worse position as regards the execution of his decree than he would have occupied if he had not impleaded the son.

[P. 128, O. 1.]

(b) *Hindu Law—Decree against father—Family property liable—Sons can contest in execution the existence and morality of debt.*

In execution of a simple money decree against a father, the decree-holder can put to sale the family property, and the sons are entitled to an opportunity of contesting it either on the grounds of non-existence of the debt or of immorality. (28 All. 288 and 3 A.L.J. 433, *Foll.*; 18 Cal. 21 (P.C.) and 22 Mad. 519, *Ref.*.)

[P. 127, O. 2.]

Surendra Nath Sen—for Appellants.

Durga Charan Banerji—for Respondents.

Tudball, J. :—The respondent in this appeal is the Official Liquidator of the

Imperial Bank of Aligarh and this appeal arises out of execution proceedings taken under a decree obtained by the Bank, on 24th April, 1910, against one Moti Lal, the father of the two appellants, on the basis of a pro-note executed by Moti Lal alone.

The sons were also impleaded as defendants to the suit but as they were not parties to the pro note, the suit as against them was withdrawn.

The family to which Moti Lal belonged consisted of himself and the two sons and his brother and thus Moti Lal on partition would have been entitled to a 1-6th share. When the decree was obtained it was put into execution and the interest of Moti Lal, *i.e.*, 1-6th share in certain property was put to sale.

It was again put into execution as this did not satisfy the decree against Moti Lal and the decree-holder sought to put the remaining five-sixth share to sale. The brother, Babu Lal, and the two sons both filed objections. Those of Babu Lal were allowed and his share released.

The objections of the two sons were disallowed and hence the present appeal.

The ground of objection in the Court below, as entered in the petition filed jointly by the brother and sons, was merely that the attached property belonged to the objectors and not to the judgment-debtor and was, therefore, not liable to be sold. The lower Court's judgment, however, shows that the case presented to it was :—

(1) That there had been a partition in July, 1910, *i.e.*, just after the Bank's decree had been obtained, under which Moti Lal had separated, leaving his sons still joint with his brother and, therefore, the attached property was not liable.

(2) That the liability of the sons' share was *res judicata*, because the Bank after making the sons parties to the suit withdrew it as against them.

The Court below held (1) that the alleged partition was one collusively and fraudulently made, if at all, to defeat the creditor and, therefore, could not rid the sons of their liability for the father's debt, quoting the ruling in *Krishnasami Konan v. Ramasami Ayyar* (1), and (2) that the rule of *res judicata* did not apply in the circumstances of the case.

In their memorandum of appeal the grounds taken are really only three in number. The first, fourth and fifth relate

to the partition. The second and third relate to the question of *res judicata*. The sixth is a fresh plea that the debt is not of such a nature as to bind the sons.

At the first hearing of the appeal it was stated that the pleas as to the partition and *res judicata* would not be pressed, but at a subsequent hearing it was stated that the plea as to the legal effect of the partition would not be dropped. Nothing has been said on the sixth ground of appeal.

The plea mainly pressed before us is that the decree-holder, not having obtained a decree against the sons, is not entitled in law to execute his decree against the shares of the sons; that if he wishes to make their shares liable he must bring a separate suit.

The other point taken is that Moti Lal having separated, the share of the sons is no longer liable for the father's debt and there is no sufficient evidence to show that the partition was a collusive or colourable transaction. In regard to the former the present case is very similar to the case of *Shiam Lal v. Ganesu Lal* (2). The facts there were that a Hindu father borrowed money on a promissory note which he alone executed. A suit was instituted against him and his son on the basis of the pro-note. It was dismissed as against the son on the ground that he was no party to the pro-note. It was decreed against the father.

In execution of the decree the family property was attached and sold. The son thereupon instituted a suit for a declaration that the decree could not be properly executed against his interest in the family property, in view of the fact that the suit had been dismissed against him and for possession of his share. It was held by a Bench of this Court that he was not entitled to any such declaration as the dismissal of the suit left him in the same position as if he had not been impleaded, *i. e.*, it left him liable as a Hindu son to pay any debt of his father not shown to be tainted with immorality and as the question of immorality had not been raised his suit must fail. This ruling was followed by Banerji, J., in *Chhannu Tiwari v. Dwarka Kuar* (3). *Prima facie* a decree obtained against A cannot be executed by the attachment and sale of B's property, *i. e.*, if B objects. But the position of a son in a joint Hindu family is by reason

of his pious duty to pay his father's debt not incurred for immoral purposes very different from that of an ordinary third party. In *Nanoni Babuasin v. Modhun Mohin* (4), their Lordships of the Privy Council say (at page 35): "Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality." A creditor having obtained a decree against the father, therefore, is entitled to put to sale the family property, *i. e.*, the Court can do that which the father himself would be empowered to do under the law. The son whose interests are threatened is entitled to an opportunity of contesting both the factum and the nature of the debt, and there is nothing in law to prevent him from coming into Court in the execution department and preventing, if possible, on these two grounds the passing of his interests to the auction purchaser. If the points are decided against him, the Court in execution can put the property to sale.

No plea of immorality "or" non existence of the debts has been pressed before us, nor indeed is there anything in the suit itself to raise even a suspicion as to the factum or nature of the debt.

In regard to the alleged partition between Moti Lal on the one side and his brother and sons on the other, I would point out that the plea was at first dropped and then revived and that I have no hesitation in holding that if any such partition was formally made, it was only a colourable transaction carried through with a view to defraud and defeat the Bank. The facts noted in the lower Court's judgment leave no doubt in my mind on this point. The appellants cannot be allowed to defeat the respondent in this manner. In this view it is unnecessary to decide the question whether if a *bona fide* partition had taken place the decree-holder would, in execution of his decree obtained against the father alone be able to attach and sell the son's separate share or whether it would be necessary for him to bring a fresh suit, as held in *Krishnasami Konar v. Ramasami Ayyar* (1). I do not wish it to be considered that I agree with this ruling

(2) (1906) 28 All. 288=3 A. L. J. 10=1906 A.W.N. 33.

(3) (1906) 3 A.L.J. 433=1906 A.W.N. 137.

(4) (1886) 13 Cal. 21=13 I.A. 1 (P.C.).

There is a good deal perhaps to be said for the opposite view, but it is unnecessary to decide the point in the view I take of the facts. I would dismiss the appeal.

Piggott, J. :—[concur generally, though I should be disposed to insist more strongly than my learned colleague has done on the finding against the alleged partition. That being found against the appellants, the joint family property in the hands of the father and his sons remains liable, at any rate to the extent of their total shares. If execution had been taken out in the first instance against the shares of the father and the sons, I do not see how the sons could have avoided execution except on proof of the non-existence of the debt or of its being tainted with immorality. The question is whether the creditors are put in a worse position in this particular case by reason of the fact that they brought their suit in the first instance against the father and sons jointly, or by reason of the fact that they took out execution in the first instance against what they described as the father's share in the joint family property. As to the first point, it seems to me that the creditors made a mistake in impleading the sons along with the father, but recognised that mistake in time and cannot be put in a worse position as regards the execution of their decree than they would have occupied if they had simply sued the father on his unsecured debt and obtained a money-decree against him as they actually did. With regard to the second point, I do not think it can be held that the decree-holders, in taking out execution against a certain specified share as the property of Moti Lal, thereby admitted that no other share in the same property was capable of attachment in execution of their decree. Their position admits of being stated thus :—"To the extent of a one-sixth share no one will deny that this property is liable to attachment and sale in execution of our decree. We, therefore, try, first of all, whether our decree cannot be satisfied by the sale of this share." Finding that the decree could not be so satisfied, they claimed to proceed against the rest of the joint family property. The sons cannot defeat this claim, except on grounds which could have been successfully pleaded if the share of the father and that of the sons had been jointly attached in the first instance. I concur in dismissing this appeal.

By the Court :—The order of the Court, therefore, is that the appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 128.

RAFIQUE, J.

C. Simpson—Defendant-Applicant

v.

E. Bachman—Plaintiff-Respondent.

Civil Revn. No. 90 of 1914, decided on 21st October, 1914, from the decision of Small Cause Court J., Dehra Dun, dated 6th April, 1914.

Tort—Husband not liable for misappropriation by wife, to her master.

A husband is not liable for the acts of misappropriation committed by his wife during the course of her service which he had allowed her to take up. [P. 128, C. 2]

Nihal Chand—for Applicant.

M. L. Agarwala—for Respondent.

Judgment :—This is an application in revision from a decree of the Small Cause Court Judge of Dehra Dun. Mrs. Bachman, the respondent, had employed Mrs. Simpson, the wife of the appellant, as housekeeper to manage the boarding house belonging to Mrs. Bachman. In August 1913, Mrs. Simpson severed her connection with the boarding house. Mrs. Bachman sued her and her husband for the recovery of Rs. 346-7-0, on the allegation that Rs. 50 had been advanced to Mrs. Simpson with the consent of her husband which had not been re-paid, and the balance had been misappropriated by Mrs. Simpson during the time that she acted as housekeeper.

The claim was resisted by both the defendants. The husband denied his liability on the ground that he was not liable for any acts of misappropriation of his wife. The learned Judge of the Small Cause Court decreed the claim against both the defendants. He held that the husband was liable because he had allowed his wife to act as house-keeper to Mrs. Bachman. Mr. Simpson comes up in revision to this Court and contends that he is not liable for the sums misappropriated by his wife in spite of his having allowed her to take up the service of Mrs. Bachman as house-keeper. I think that the contention for the applicant must prevail. The

husband cannot be made liable for acts of misappropriation of his wife simply because he has allowed her to take up service, *vide* the Law of the Domestic Relations by William Pinder Eversley, third Edition, page 282, last paragraph. With regard to a portion of the claim I find that the applicant had undertaken to re-pay it, *viz.*, Rs. 50, which had been advanced to his wife, *vide* Exhibit 4. The application, therefore, prevails with regard to Rs. 296-7-0. I modify the decree of the Court below by dismissing the claim of the plaintiff to the extent of Rs. 296-7-0 as against Mr. Simpson, defendant No. 2. Costs of this application are allowed to the applicant.

Decree modified.

A. I. R. 1915 Allahabad 129 (1).

CHAMIER AND PIGGOTT, JJ.

Ramji and others—Defendants-Appellants

v.

Koman Das—Plaintiff-Respondent.

First Appeal No. 107 of 1914, decided on 24th November, 1914, from the order of the Sub-J., Muttra.

Civil P. C. (V of 1908), O. 43, R. 1—Order allowing provisionally application for appointment of receiver and calling parties to furnish names and other details is not appealable.

Where on an application for appointment of a Receiver the Court made an order in these words:—"I allow the application provisionally and call on parties to put in applications showing their claims regarding the person and power of the Receiver, and the income, if any, that is to be paid by him to the objectors."

Held, that as the order does not amount to appointment of a Receiver, no appeal lies against the order. [P. 129, C. 2.]

Sunder Lal—for Appellants.

Gulzari Lal—for Respondent.

Judgment :—This is an appeal against an order which is said to be an order appointing a Receiver, and, therefore, appealable under O. XLIII, R. 1, Cl. (s). What the Subordinate Judge says is this:—"I allow the application provisionally and call on parties to put in applications showing their claims regarding the person and power of the Receiver and the income, if any, that is to be paid by him to the objectors." It seems to us that the Subordinate Judge came to the

conclusion that it was a case in which a Receiver should be appointed, but he did not find himself in a position to definitely appoint a Receiver without further information. The language used is no doubt peculiar; but it seems to us impossible to say that the Subordinate Judge has in fact appointed a Receiver. His language amounts to no more than an expression of opinion that a Receiver should be appointed and a statement that he proposes to appoint one. We hold that no appeal lies against the order. We, therefore, dismiss this appeal and we direct that the costs of this appeal be costs in the cause.

Appeal dismissed.

A. I. R. 1915 Allahabad 129 (2).

RICHARDS, C. J. AND BANERJI, J.

Mohamad Wali Khan—Plaintiff-Applicant

v.

Mohamad Mohiuddin Khan and others—Defendants-Respondents.

Privy Council Appln. No. 28 of 1913, decided on the 5th December, 1914, for leave to appeal to His Majesty in Council.

Civil P. C. (V of 1908), S. 110—Two connected first appeals out of same suit disposed of together—Permission to appeal to Privy Council granted in one other case also fit for permission.

Two connected first appeals arising out of the same suit were disposed of by the High Court. In one of the appeals the High Court confirmed the decision of the lower Court and in the other reversed it. The same question was involved in both the appeals. Leave for appeal to the Privy Council was given in the one in which the High Court had reversed the judgment of the Court below.

Held, that under the circumstances the other case also was a fit one for appeal to His Majesty in Council. [P. 130, C. 1.]

Abdur Raoof—for Applicant.

Sunder Lal and Tej Bahadur Sapru—for Respondents.

Judgment :—The value of the subject-matter of the suit out of which this appeal arises and of the proposed appeal to His Majesty in Council exceeds Rs. 10,000, but this Court affirmed the decree of the Court of first instance. We have, therefore, to see whether the case fulfills the requirements of S. 110 of the Code of Civil Procedure, or is otherwise a fit one for appeal to His Majesty in Council.

The question which is involved in appeal No. 29 is involved in the proposed appeal. Both appeals arise out of the same suit. To a large extent at least the decree of this Court will be wrong in the event of their Lordships of the Privy Council differing from the view taken by this Court in Appeal No. 29. We think, therefore, under the special circumstances of this case that we are justified in certifying that the case is "otherwise a fit one for appeal to His Majesty in Council," and we so certify.

Leave granted.

A. I. R. 1915 Allahabad 130.

CHAMIER AND PIGGOTT, JJ.

Kunwar Bahadur—Plaintiff-Appellant
v.

Bindrabam and another—Defendants-Respondents.

Second Appeal No. 192 of 1914, decided on 15th December, 1914, from the decision of the Sub-J., Farrukhabad, dated 3rd November, 1913.

Limitation Act (IX of 1908), Art. 120—Suit by reversioner for declaration against widow's alienation is governed by Art. 120.

A suit for declaration that an alienation by a Hindu widow is not binding on the plaintiff, a remote reversioner, is governed by Art. 120 of the Limitation Act [P. 132, C. 1.]

The cause of action accrues on the date of alienation. [P. 131, C. 2.]

Tej Bahadur Sapru—for Appellant.

S. C. Banerji—for Respondents.

Judgment:—This is a second appeal by a plaintiff whose suit for a declaration has been dismissed by the lower Appellate Court as barred by limitation. Debi Das, father of the plaintiffs, had two brothers, Jwala Parshad and Prag Das; they lived separately. Jwala Parshad died childless, leaving a widow, *Musammatt* Rukmani. This lady, while in possession of the property of her late husband with a Hindu widow's estate, executed a deed of sale on February 12th, 1898, transferring to certain persons, who appear as defendants Nos. 1 and 2 in the case, a house which had belonged to her late husband. By the present suit instituted on April 11th, 1913, the plaintiff sought a declaration that this sale-deed was ineffectual as against him and enforceable only during the life-time of *Mt. Rukmani*. He

impleaded this lady as a defendant, and also his own father, Debi Das, and his uncle, Prag Das. Only the defendants-vendees contested the suit, no appearance being entered by any of the others. Ordinarily the plaintiff would not be permitted to maintain such a suit he not being the nearest reversioner to the estate of Jwala Parshad in the presence of his own father and uncle. The plaintiff accordingly pleaded that Prag Das had colluded with *Mt. Rukmani* and with the vendees at the time of the sale; with reference to Debi Das he pleaded that the latter had long since severed himself from all connection with mundane affairs and elected to reside in solitude in a certain garden. He claimed that a cause of action accrued to him on February 13th, 1910, the date on which a suit by his father or his uncle became barred by limitation under the provisions of Art. 125 of the first Schedule to the Indian Limitation Act (IX of 1908) and that his suit was within time under Art. 120 of the same Schedule. It may be noted that the plaintiff gave his own age as thirty years in June or July, 1913, so that he attained majority within three years of the execution of the sale deed in question. There is, therefore, no question of any extension of period of limitation on the ground of the plaintiff's minority.

The learned Subordinate Judge has found clear authority, in certain decisions of the Madras High Court referred to in his judgment, for the proposition that the plaintiff's cause of action accrued to him on the date of the execution of the sale-deed of February 12th, 1898, and that the period of limitation for the same is that provided by Art. 120 of the Schedule to the Limitation Act. He has not, therefore, thought it necessary to examine in any detail the precise pleadings in this particular case. Yet these are sufficient in themselves to make the plaintiff's position a very difficult one, even if the propositions of law contended for on his behalf are correct. So far as his uncle Prag Das is concerned, the plaintiff's allegation that a cause of action accrued to him on February 13th, 1910, will not bear a moment's examination. He says that Prag Das colluded with the vendor and vendees at the time of this sale, so that he had his cause of action complete on that date, or at latest on the date on which the fact of Prag Das' collusion became known to him. As

regards the plaintiff's father, the point may not be quite so clear because the facts have not been gone into. A comparison of the plaint and the written statement certainly suggests that the parties intended to plead, and did in fact plead, that Debi Das' withdrawal from all interest in worldly affairs took place prior to the execution of the contested sale-deed. The plaintiff uses the vague expression "long since," the defendants, while admitting the correctness of the paragraph in the plaint regarding Debi Das' withdrawal from the world, pleaded that the deed in suit had been executed with the knowledge and information of, and in consultation with, the plaintiff and his uncle, Prag Das. The fact that it would have been useless for the vendees to attempt to obtain the consent of Debi Das was presupposed by the pleadings and the frame of the issues. If this fact be admitted, it seems clear that the plaintiff on his own showing had a complete cause of action the day on which he knew that Prag Das had wrongfully colluded with the vendor and vendees to execute the sale-deed in suit. Whether he had a valid cause of action, is, of course, quite a different question and one as to which we express no opinion; it is enough to find that it was a cause of action which had become barred by time long before the institution of the present suit.

When the facts above noticed were brought out in the course of arguments before us, a strong appeal was made to us not to decide the matter on these grounds without remitting issues to the Courts below, the point taken being that neither of those Courts had considered the question of limitation in this particular light. We are not disposed to remit issues. It cannot be said that such a question as the date of the retirement of Debi Das from all interest in worldly affairs, or the precise nature of that retirement, was ever put in issue on the pleadings. The parties went to trial on the admission that this retirement took place so long ago that its precise date was quite immaterial and practically also on the admission that this retirement was so effective and complete that Debi Das had put himself in such a position that he could not be expected to do anything to protect the interests of his son from the nefarious schemes of the other defendants.

Apart from this, as the question of law involved was argued before us at length, we think it right to say that we are not

prepared to accede to the proposition of law on which the plaintiff-appellant's case rests. In the case of an alienation by a Hindu widow the person or persons who would be entitled at any given moment to succeed to the estate of her late husband, have a cause of action from the date of the alienation and a right to sue under Art. 125 of the first Schedule to the Indian Limitation Act within twelve years of the date of such alienation. The contention for the appellant is that their failure to do so within twelve years *ipso facto* creates a cause of action for the next reversioner or reversioners, which action may be brought within a further period of six years under Art. 120 of the same Schedule. It would follow that the expiration of this period would create a fresh cause of action with a further period of limitation for the reversioner or reversioners one degree further removed and so on for the whole life-time of the widow. No direct authority can be quoted for propositions so remarkable.

The principal cases referred to in argument may be noted below:—

Rani Anund Kunwar v. Court of Wards (1); *Abinash Chandra Mozumdar v. Harinath Shaha* (2), *Jhula v. Kanta Prasad* (3); *Bhagwanta v. Sukhi* (4), *Ayyadurai Pillai v. Solar Ammal* (5); *Govinda Pillai v. Thayammal* (6).

In the first of these, their Lordships of the Privy Council were dealing with a suit to set aside an adoption, a suit for which a period of twelve years from the date of the adoption is specifically provided, by whomsoever the suit may be brought. It is certain, therefore, that when they spoke of some act or omission on the part of the nearest reversioner by which the latter disabled himself from suing, they were not thinking of the reversioners merely allowing the prescribed period of limitation to run out. In the Allahabad case no question of limitation arose. The cases in *Abinash Chandra Mozumdar v. Harinath Shaha* (2) and *Govinda Pillai v. Thayammal* (6) turned on the minority of the plaintiff in each of those cases. The truth appears to be that the various Articles in the Schedule to the Limitation

(1) (1881) 6 Cal. 764=8 I.A. 14=8 C.L.R. 381=4 Sar. 195=45 Bom.L.R. 73 (P.C.).

(2) (1905) 32 Cal. 62=9 C.W.N. 25.

(3) (1887) 9 All. 441=(1897) A.W.N. 91.

(4) (1899) 22 All. 433=1899 A.W.N. 159 (F.B.).

(5) (1901) 24 Mad. 405.

(6) (1905) 28 Mad. 57=14 M.L.J. 209.

Act dealing with such suits as the present and cognate suits to contest an adoption by a widow were framed with special reference to the provisions of S. 42 of the Specific Relief Act (I of 1877). The Schedule, therefore, made no express provision for the rare cases in which a suit like the present is permitted to be brought by a more remote reversioner by reason of collusion or wilful default on the part of the nearest reversioner, or reversioners. The result, no doubt, is that such suit must necessarily be referred to Art. 120 of the Schedule. It does not follow, however, that a remoter reversioner is thereby entitled to sit still and wait for limitation to run out against every reversioner nearer in degree than himself. An improper alienation by a Hindu widow is a wrong to the entire body of reversioners, and in a sense it affords an immediate cause of action to all of them. The reason why such action is ordinarily required to be brought by the nearest reversioner in degree and the special cases in which this rule may be relaxed, have been pretty well settled since the decision of the Privy Council in *Rani Anund Kunwar v. Court of Wards* (1). But it is for more remote reversioners to be on the watch to safeguard their own interests and when they find that no action is being taken by the nearest reversioner or reversioners, to inquire into the reasons for such inaction and call upon the person or persons entitled to do so to protect the interests of the whole body of reversioners. For the purposes of the present case it is quite sufficient to say that it must lie heavily on the plaintiff in a suit like the present to explain why he took no action before the period of limitation prescribed for a suit by the nearest reversioner had expired. It is not necessary for us to go the full length of the Madras rulings relied on by the learned Subordinate Judge in order to arrive at the conclusion that he has rightly dismissed the present suit as time-barred. So holding we dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 132.

RAFIQUE, J.

Deo Dutt Pande and others—Plaintiffs-Appellants

v.

Kuleshwar Dube and others—Defendants-Respondents.

Second Appeal No. 1265 of 1914, decided on 12th March, 1915, from the decision of the Sessions and Sub-J., Jaunpur, dated 2nd June, 1914.

Tort—Nuisance—Overhanging branches can be removed.

A party has a right to the removal of the branches of a tree, which overhang his house. (19 Bom. 420 and 31 Cal. 944, *Foll.*) [P. 133, C.I.]

Haribans Sahar—for Appellants.

Muhammad Ishaq Khan—for Respondents.

Judgment :—The relevant facts of this appeal are as follows :—The plaintiffs-appellants are tenants and reside in the village of Karao in the district of Jaunpur. To the west of their house is an old *pipal* tree, some of the branches of which overhang their house. They instituted this suit in the Court of the Munsif of Jaunpur against the *zemindars* of the village for an injunction restraining the latter from preventing the plaintiffs from cutting down the *pipal* tree and appropriating its timber. The plaintiffs alleged that the tree belonged to them and they wanted to cut down the branches overhanging their house, but were prevented by defendants Nos. 1 and 2. It was further alleged in the plaint that in case the plaintiffs failed to prove their title to the tree, the defendants should be made to cut down the branches overhanging the house of the plaintiffs as the tree was old and likely to fall down any moment and cause damage to them. The claim was resisted principally by defendant No. 2, who claimed the tree as his and denied that it was in a dangerous condition. The learned Munsif dismissed the claim, holding that the tree belonged to the *zemindars*. On appeal the learned Subordinate Judge remanded the case under O. XLI, R. 25, Civil Procedure Code, for the trial of a fresh issue as to whether the *pipal* tree was dangerous to the plaintiffs and, if so, were they entitled to have it cut down. The first Court returned a finding against the plaintiffs to which objections were

taken. The learned Subordinate Judge agreed with the first Court that the plaintiffs had failed to prove their title to the tree as also its dangerous condition, but as the tree was an old one and some of its branches overhung the house of the plaintiffs, the latter were entitled to have those branches cut down. The decree of the first Court was accordingly modified. As to costs the order was that the parties were to bear their own costs in both Courts. The plaintiffs have preferred a second appeal to this Court. They say that the lower Appellate Court ought to have decided the question with regard to the *nib* tree also which has grown inside the *pipal* tree. They further urge that under the circumstances of the case the decree should have been for the removal of the entire tree or at least for so much of it as overhangs the house of the plaintiffs. They dispute the order of the Court below as to costs and contend that costs should have been allowed to them. I do not think that the first contention of the plaintiffs-appellants is maintainable. It was not alleged by them that the *nib* tree overhangs, or in any way affects their house. They cannot, therefore, ask for its removal. Nor have they made out any case for the removal of the entire *pipal* tree. It has been found as a fact by both the Courts below that the tree in question is not in a dangerous state. The lower Appellate Court, as a matter of precaution because of the old age of the tree, has allowed the lopping off of the western branches of the tree which overhang the house of the plaintiffs. The finding is not that it is in a dangerous state, but that at some future time the branches which overhang the plaintiffs' house might fall down and injure it or its inmates. The learned Subordinate Judge need not have based his judgment on that ground at all, as under the law the plaintiffs have a right to the removal of the branches of the tree which overhang their house, vide *Hari Krishna Joshi v. Shankar Vithal* (1) and *Lakshmi Narain Banerjee v. Tara Prosanna Banerjee* (2). According to the finding of the lower Appellate Court the northern branches of the tree, by which are presumably meant the north-western branches, as the report of the *Amin* shows, also overhang the house of the plaintiffs. The latter have, therefore, a right to ask for the cut-

ting down of those branches also. The appeal, therefore, must prevail as regards those branches. As to the last contention for the plaintiffs relating to costs, I do not think there is any force in it. Substantial allegations of the plaintiffs and principal reliefs sought by them have been disallowed. I think that the order of the lower Appellate Court with regard to costs was a correct order. I, therefore, modify the decree of the Court below by directing the defendant No. 2 to cut down the north-western and western branches of the tree in question which overhang the plaintiff's house. The rest of the appeal fails and is dismissed. I also make no order as to costs.

Appeal partly allowed.

A. I. R. 1915 Allahabad 133.

CHAMIER AND PIGGOTT, JJ.

Bhola Nath—Plaintiff-Appellant

v.

Kartik Prasad Pande—Defendant-Respondent.

Civil Revn. Petn. No. 132 of 1914, decided on 14th December, 1914, from the decree of the Sub-J., Mirzapur, dated 14th May, 1914.

Civil P. C. (V of 1908), S. 115—Not granting reasonable time to furnish security under O. 41, R. 10 is material irregularity.

Where a notice issued to the appellant to show cause why he should not be required to furnish security before his appeal was heard, does not put the appellant on his guard that the security must be ready in the event of sufficient cause not being shown, the dismissal of the appeal on failure to furnish the security not within a time under ordinary circumstances sufficient for him to furnish is a material irregularity within the meaning of S. 115 of the Civil Procedure Code, 1908. [P. 134, C. 1.]

P. L. Banerji—for Appellant.

W. Wallach—for Respondent.

Judgment :—This application for revision arises out of the following facts. An appeal was pending before the Subordinate Judge of Mirzapur in which 15th of May, 1914, was fixed for hearing. On the 29th of April, 1914, the respondent applied under O. XLI, R. 10, Civil Procedure Code, that the appellant might be ordered to furnish security for the costs of the first Court and of the Appellate Court before the appeal was heard. The Subordinate Judge passed an English order to

(1) (1895) 19 Bom. 420.

(2) (1904) 81 Cal. 944=8 C.W.N. 710.

the effect that notice should go to the appellant to appear before the Court on May, the 14th, 1914, and to show cause why he should not be required to furnish security to the amount of Rs. 150 before the appeal was allowed. No sufficient cause being shown, an order was passed requiring security in the sum named to be furnished on the following day. This order was not complied with and the appeal was thereupon dismissed without having been heard on the merits. There had been one irregularity in the proceedings, in that the vernacular notice issued to the appellant was not in accordance with the Judge's English order. It directed the appellant to show cause on May 14th, 1914, why he should not be required to furnish security before the appeal was heard, and not before the appeal was allowed. The apparent object of the Subordinate Judge was that the question of the application by the respondent in the matter of the security should be disposed of in time to ensure the hearing of the appeal on the date fixed, that is to say, on May 15th, 1914. If he had seen fit to issue a notice so worded as to call upon the appellant either to furnish security on the date specified, or to show adequate cause to the contrary, his order would have been unassailable. The notice actually issued, besides being at variance with the Court's English order, did not put the appellant on his guard that the security must be ready in Court in the event of sufficient cause not being shown. In his order disposing of the matter, the learned Subordinate Judge admits that under ordinary circumstances an order giving the appellant, who was a resident of Benares, only one day in which to furnish the required security would not have been a proper order. He assumes, however, that the notice issued by the Court was sufficient to give the appellant warning that he must either come to Court on the 14th May, 1914, with his security ready, or must be prepared to show adequate cause against his being required to furnish such security. This contention overlooks the fact that the notice issued by the Court was not calculated to warn the appellant to have his security ready on May, the 14th. We think that the proceedings of the Court below were irregular and the irregularity was a material one, the case being a hard one, inasmuch as the appeal was dismissed unheard because of the appellant's failure to comply

with an order which, the learned Subordinate Judge himself admits, was not on the face of it an order with which he could reasonably have been expected to comply. We accept this application, set aside the order dismissing the appeal and direct the Subordinate Judge to re-admit the appeal on to his file of pending cases and to give to the appellant reasonable time, not less than one week, within which to comply with the order requiring him to furnish security. The costs of this application will be costs in the suit.

Order of dismissal set aside.

A. I. R. 1915 Allahabad 134.

PIGGOTT, J.

Emperor—Applicant

v.

Paras Ram Dube—Opposite Party.

Criminal Revn. Petn. No. 33 of 1915, decided on 28th January, 1915, from the order of Addl. Sessions J., Gorakhpur.

Penal Code (XLV of 1860), Ss. 82, 83, 354 and 376—English Law presumption of inability of boy of 14 committing rape is not applicable in India—It is question of fact.

The presumption of English Law against the possibility of the commission of the offence of rape by a boy under the age of 14 years has no application in India. Such a question is a question of fact only. [P. 134, C. 2.]

Judgment :—I called for the record of this case on examination of the sessions statement from the District of Basti for the month of November, 1914. One Paras Ram, a boy described as being between 12 and 14 years of age, was charged with having committed the offence of rape on the person of a little girl about seven years of age. The learned Sessions Judge has convicted in the alternative under S. 376 or S. 354 of the Indian Penal Code, not because he was in any doubt as to the facts, but because he considered that there was a difficulty as to whether a boy of the age of the accused could legally be convicted of the major offence charged. The presumption of English Law against the possibility of the commission of the offence of rape by a boy under the age of 14 years has no application in this country. The law on the subject of infamy in connection with criminal liability is laid down in Ss. 82 and 83 of the Indian Penal Code and nowhere else. It was a

simple question of fact which the learned Sessions Judge had to try, as to whether, in the course of the assault perpetrated by the accused on the person of this little girl, such penetration had been effected as is required by law to constitute the offence of rape. If the statement of the girl, Kolharia, is read in connection with the medical evidence, there can be no doubt that the offence of rape was committed. I thought it advisable to place these remarks on record in view of the difficulty felt by the Sessions Judge. I do not propose to interfere with the sentence passed by him. The question of the proper punishment for an offence of this sort by boys of tender age is not an easy one, and many Sessions Judges of experience are of opinion that a sentence of whipping only is the most appropriate one that can be inflicted in such cases. I think the accused Paras Ram has been somewhat leniently dealt with, but interference on the part of this Court is not now called for. Let the record be returned.

Petition rejected.

A. I. R. 1915 Allahabad 135.

CHAMIER AND PIGOTT, JJ.

Tilak Pandey and others—Applicants

v.

Emperor—Respondents.

Criminal Rvn. Petn. No. 175 of 1914, decided on 22nd March, 1915, from the order of the Sub-J., Basti, dated 1st September, 1914.

Criminal P. C. (V of 1898), S. 476—No time limit for proceeding under S. 476.

There is nothing in S. 476 of the Criminal Procedure Code which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. (14 I. C. 766 and 1 I. C. 306, *Foll.*, and *Case-law Ref.*) [P. 136 C 1.]

Harnandan Lal and Lakshmi Narayan—for Applicants.

A. E. Ryves—for the Crown.

Facts :—One Shiv Narain died leaving *Mt. Mohra*, a daughter, *Mt. Abbaji*, a widowed daughter-in-law, and *Mt. Daulata*, the widowed daughter-in-law of one of Shiv Narain's brothers. Every one of the three applied to the Revenue Court for mutation in her name. *Mt.*

Daulata retired, but *Mt. Mohra* and *Mt. Abbaji* compromised and agreed that *Abbaji's* name should continue for her life and after that *Mohra's* name should be recorded. Later on, *Triloke Pande* and others collaterals of *Shiv Narain*, applied to the Revenue Court objecting to the compromise and the order of the Revenue Court thereon. *Abbaji* supported the collaterals. The Revenue Court referred them to the Civil Court. Two suits, one by *Mohra* for possession and the other by *Triloke* for possession were brought before the Sub-Judge, *Triloke's* case being that *Mohra* was not *Shiv Narain's* daughter. The Sub-Judge held that *Mohra* was *Shiv Narain's* daughter and took action under S. 476, Criminal Procedure Code, against the applicants for false verifications of pleadings and giving false evidence.

The applicants applied in revision to the High Court.

Judgment :—This is an application for revision of an order of the Subordinate Judge of Gorakhpur, under S. 476 of the Code of Criminal Procedure, directing the prosecution of the applicants on various charges in connection with pleadings verified, and evidence given by them, in two cases tried by the Subordinate Judge. It appears that one *Mt. Mohra* brought a suit to establish her right to certain property as the daughter of *Shiv Narain*. The applicants and others brought another suit against *Mt. Mohra* for possession of property, on the ground that she was not the daughter of *Shiv Narain*. The two cases were tried together, and the Subordinate Judge found that *Mt. Mohra* was the daughter of *Shiv Narain*. He waited for a month probably to see whether appeals would be filed against his decision, and as soon as the month had expired he took proceedings against the applicants under S. 476 of the Code of Criminal Procedure. On the part of the applicants it is contended that the Subordinate Judge had no jurisdiction to take action against them a month or more after he had disposed of the cases in which the offences are alleged to have been committed. We have been referred to several decisions on the subject. A Full Bench of the Madras High Court (*Miller, J.*, dissenting) has held that the power conferred by S. 476, Criminal Procedure Code, can be exercised by the Court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter

as to make it really the continuation of the proceedings in the course of which the offence was committed or brought to notice. See *Aiyakannu Pillai v. Emperor* (1), which followed a previous decision of the same Court in *Rahimadulla Sahib v. Emperor* (2). The Madras High Court declined to follow the decision of the Bombay High Court in *Lakshmidas Lalji, In re* (3), in which the learned Judges said that they were unable to find anything in the language of S. 476 making it incumbent upon a Court acting under it to take action, if at all, within any particular period or at any particular time. There is also a reported decision to the effect that action should not be taken by a Court under S. 476 before the close of the case in which the offence is brought to the notice of the Court. See *Emperor v. Rustomji Hormusji Tarwalla* (4). This Court in *Girwar Prasad v. Emperor* (5) declined to follow the decision of the Madras High Court referred to above, and held that a Munsif had jurisdiction to take action under S. 476, 18 months or more after the conclusion of the case in which the offences were said to have been committed, and in *Nawal Singh v. Emperor* (6), Mr. Justice Banerji upheld the order of a Subordinate Judge passed under S. 476 several years after the conclusion of the case in which the offences were said to have been committed. We agree with the view which has hitherto been taken by this Court that there is nothing in S. 476 which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. Cases can easily be imagined where it would be impossible or inadvisable to take action immediately on the conclusion of the case. In the present case the Subordinate Judge appears to us to have exercised a wise discretion in abstaining from taking action against the applicants until he knew that no appeal had been filed against his decision. It would have been useless to prosecute the applicants for the offences which

they are supposed to have committed, if there had been an appeal in the case and the District Judge had held that *Musamat Mohra* was not the daughter of Sheo Narain. We express no opinion on the merits of the case or on the advisability of the prosecution which has been ordered. In our opinion the Subordinate Judge had jurisdiction to direct the prosecution of the applicants and we have, therefore, no power to interfere with his order. The application is dismissed with costs, including fees in this Court on the higher scale.

Application dismissed.

A. I. R. 1915 Allahabad 136.

PIGOTT, J.

Mt. Dulari and another—Plaintiffs-Appellants

v.

Lal Bahadur Singh—Defendant-Respondent.

Second Appeal No. 1499 of 1913, decided on 18th January, 1915, from the decision of the Dist. J., Benares, dated 18th August, 1913.

Transfer of Property Act (V of 1882), S. 60—Condition not to redeem for 59 years is no clog on equity of redemption.

Where a mortgage-deed ensured to the mortgagee possession for 59 years before the mortgagor was entitled to redeem.

Held, that the mortgage could not be redeemed before the expiration of that period.

[P. 137, C. 1.]

Harnandan Prasad—for Appellants.

J. N. Sen—for Respondent.

Judgment:—This was a suit for redemption of a usufructuary mortgage, dated March 14th, 1898. The suit was instituted on the 19th of July, 1912. It has been dismissed by the District Judge, on the ground that it was premature as the terms of the deed provided for redemption only after the expiration of a period of 59 years. The first point taken in appeal is that the plaintiffs were entitled to redeem before the expiry of the term, because the defendant had himself broken an important stipulation in the contract by neglecting to pay the sum of Rs. 75 due to one Batore, who was a usufructuary mortgagee of a portion of the land in suit. This plea was not very clearly taken in the memorandum of appeal, but it was based in argument on the case of *Chhatku*

(1) (1909) 1 I. C. 597=32 Mad. 49=9 Cr. L. J. 41 (F.B.).

(2) (1908) 31 Mad. 140=17 M. L. J. 584=7 Cr. L. J. 54.

(3) (1908) 32 Bom. 184=10 Bom. L. R. 28.

(4) (1902) 4 Bom. L. R. 778.

(5) (1909) 1 I. C. 306=9 Cr. L. J. 219.

(6) (1912) 14 I. C. 766=34 All. 393=13 Cr. L. J. 303.

Rai v. Baldeo Shukul (1). I so far accepted this contention as to remand two issues to the Court below in regard to the position of Batore and to the paying off of his prior mortgage. The findings returned dispose of the appellants' contention on this point, as it was found that Batore was in possession as mortgagee until he was redeemed by the defendant in accordance with the stipulation in the deed now in suit. The second plea raised is that the deed in suit does not in terms preclude redemption prior to the expiration of the period of 59 years. I have read the deed. It appears to me to be so drafted as to ensure to the mortgagee possession for 59 years before the mortgagor is entitled to redeem. The third plea taken is that it lay on the defendant to prove that the transaction was fair and *bona fide*. According to the pleadings in the Court of first instance it was alleged that the original mortgagor, *Mt. Nanka*, was induced to sign the deed in suit fraudulently in ignorance of the fact that the term of 59 years was entered within which the mortgage could not be redeemed. The District Judge has found that the executant of the deed was not a *pardanashin* lady and he refers to the fact that she appeared personally before the Sub-Registrar at the time when the deed was registered. In argument before me stress has been laid on the fact that the mortgagor was a tenant of the mortgagee. It was not the plaintiffs' case that the mortgagor did understand the stipulation in the deed which allowed the mortgagee possession for a period of 59 years, but that her assent to the same was induced by undue influence. This case, therefore, cannot be brought within the terms of S. 16 of the Indian Contract Act, IX of 1872; nor should I be prepared to hold that the relations between tenants-at-fixed-rates and *zemindars* in the eastern districts of these provinces are presumably such that the latter are in a position to dominate the will of the former. Evidence was given in the case both by the mortgagor and by the mortgagee, and in view of the finding of the lower Appellate Court against the plea of fraud set up in the plaint, I do not think the plaintiff can claim to have the stipulation postponing redemption for a period of 59 years set aside, merely on the argument that it appears under the circumstances somewhat

onerous. This appeal, therefore, fails and I dismiss it with costs, including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 137.

PIGGOTT, J.

Audendra Partap Singh Sahai—Applicant

v.

Daman Singh and others—Opposite Parties.

Criminal Revn. No. 240 of 1915, decided on 19th May, 1915, from an order of the Magt., Basti.

Criminal P. C., (V of 1898), S. 145—Deep stream of Ghagra divided Fyzabad and Basti Districts—Dispute of land between two channels of Ghagra—Deep stream towards Fyzabad—Basti Magistrate competent to take cognizance.

The deep stream of the river Ghagra, as it exists at any given point, forms the boundary line between the District of Fyzabad in the Province of Oudh and the District of Basti in the Province of Agra. [P. 138, C. 1.]

A dispute arose about a piece of land situated between the two distinct channels of the river Ghagra between the District of Fyzabad and the District of Basti and the channel which was towards the Fyzabad side was found to be the deep stream of the river.

Held, that the Magistrate of Basti had jurisdiction to take cognizance of the dispute under S. 145 of the Criminal Procedure Code.

[P. 137, C. 2 & P. 138, C. 2.]

Satya Chander Mukerjee—for Applicant.

S. C. Banerji—for Opposite Parties.

Judgment:—This is an application in revision arising out of a riparian dispute. The river Ghagra flows between the District of Fyzabad in the Province of Oudh and the District of Basti in the Gorakhpur Division in the Province of Agra. It appears that at a certain point between these two districts the river divides into two distinct channels, northern and southern, leaving an island of alluvial soil between the two. A dispute having broken out between the proprietors of villages situated respectively on the Basti side and on the Fyzabad side of the river with regard to possession of a portion of this alluvial land, a Magistrate of the first class exercising jurisdiction in the District of Basti took cognizance of the dispute under S. 145 of the Code of Criminal Procedure, and after issuing notice to the

parties and conducting a formal inquiry has passed certain orders. The point taken in the application before me, and the only point with which I have to deal, is that the Magistrate's proceedings were without jurisdiction because the land in dispute was situated in, and formed part of, the Fyzabad District. The first question is as to the criterion to be applied. The Magistrate has discussed this point, and in reliance on the statements made by the parties before him and also on the records of custom found by him in the village papers, he has held that the deep stream of the river Ghagra, as it exists at any given point, forms the boundary line between the Districts of Fyzabad and Basti. In this I have no doubt that the Magistrate was right. The reasons given by him for his decision may be confirmed and strengthened by another consideration. The boundary in question is not merely between two districts, but between two provinces. In a case which came before me in the Judicial Commissioner's Court, in Lucknow the same question was raised. I was referred to a notification of the Governor General in Council fixing the deep stream of the river Ghagra as the boundary between the Province of Oudh and what is now the Province of Agra at this point. I have mislaid the reference for the moment, but my recollection is clear as to the fact. The next question is whether according to this rule the land in dispute is in fact situated in the District of Basti. The Magistrate had to determine on which side of this land the deep stream of the river is situated. In other words, he had to determine whether the northern or the southern of the two streams, of which I have already spoken, could most appropriately be described as the deep stream of the river. He seems to have gone into this matter carefully and to have based his decision in part on the evidence offered before him, and in part on his own observations in the course of two local inspections, during which he visited the two streams and the alluvial land between them at points separated by an interval of about two miles. The conclusion he has arrived at is that the southern stream represents the deep stream of the river. I am not sure how far I should be justified in any case in reconsidering this point on the present application for revision, but I am content to say that I find no sufficient reason for dissenting from the conclusion

arrived at by the Magistrate. The main point taken in argument before me against that conclusion seems to be that it was arrived at without taking specific measurements of the depth of the two streams, and indeed after an admission that the Magistrate had found it impossible to take such measurements, at any rate on the occasion on which he inspected the two streams at points immediately to the north and south of the land in dispute. As a matter of fact the question, which of two such streams may fairly be regarded as the deep stream of the river, is one to be decided on an inspection of the two streams along their entire separate course, and on a consideration of the appearance and circumstances of the two streams as a whole, including, of course, the question of the depth of each of the streams at various points. I gather from the Magistrate's order that what really settled the question to his mind was his inspection of the two streams at a point two miles further up streams from the land in dispute. He there found that the northern stream was fordable and was being easily crossed by people on foot whereas boats were lying along the southern stream. This is in effect a finding, though not based on respective specific measurements as to the depth of the two streams at this point. For the reasons given, I find no good cause for interference and dismiss this application.

Application dismissed.

A. I. R. 1915 Allahabad 138.

CHAMIER AND PIGGOTT, JJ.

Mallah—Defendant-Appellant

v.

Behari and another—Plaintiffs-Respondents.

First Appeal No. 117 of 1914, decided on 10th February, 1915, from an order of the 1st Addl. Dist. J., Aligarh, dated 29th April, 1914.

(a) *Adverse possession—Co-sharer—Burden of proof of assertion of adverse title is on person alleging to rebut presumption in favour of co-sharer.*

In a suit for possession by one co-sharer against another the plaintiff is entitled in the first instance to rely on the presumption that the possession of the defendant was on behalf of the plaintiff. It lies upon the defendant to

prove that he set up an adverse title to the plaintiff's share to the knowledge of the plaintiff for more than 12 years before the suit.

[P. 139, C. 1.]

(b) *Adverse possession—Co-sharer—Ouster cannot be presumed from non-receipt of profits.*

The fact that the plaintiff who was a co-sharer did not receive profits for many years alone does not raise a presumption of his ouster. (29 Bom. 300, *Dist.*). [P. 139, C. 2.]

Mohan Lal Sandal—for Appellant.

Tej Bahadur Sapru—for Respondents.

Judgment :—This is an appeal against an order of the First Additional Judge of Aligarh remanding for trial on the merits a suit which had been dismissed as barred by limitation by the Munsif of Bulandshahr. The plaintiffs and the defendant were co-sharers in an occupancy holding. The plaintiffs brought this suit for recovery of Rs. 189-6-0 on account of profits of their share for the years 1318 to 1321 *Fasli*, on the allegation that the defendant had wrongfully taken possession of the entire holding and refused to give the plaintiffs any portion of the profits. The Munsif found that the plaintiffs had failed to prove possession or enjoyment of profits within 12 years of the suit. On appeal the Additional Judge held that as the plaintiffs and the defendant had been admittedly joint occupancy tenants of the land, it was for the defendant to prove that he had ousted the plaintiffs from their share. In appeal it is contended that this view of the law is erroneous. In *Ahmad Raza Khan v. Ram Lal* (1), decided on the 16th of December, 1914, we held that in a case of this kind the plaintiffs are entitled in the first instance to rely on the presumption that possession was held by the defendant on behalf of the plaintiffs, and that it lay upon the defendant to prove that he had set up an adverse title to the plaintiff's share to the knowledge of the plaintiffs for more than 12 years before suit. In the present case the defendant failed to prove this. It is urged that our decision in the case cited recognises that there may be cases of exceptional nature in which ouster may be presumed, and we are referred to the case of *Gangadhar v. Parash Ram* (2) on this point. We are asked to presume that the defendant ousted the plaintiffs from their share more than 12 years before this suit. In the Bombay case the lower Appellate

Court had held in effect on the facts that there had been an ouster, and the High Court said that it was impossible for them to hold that there was no evidence of such ouster. They, therefore, dismissed the appeal. But in the present case the Additional Judge has declined to presume that there was an ouster of the plaintiffs, and we are not prepared to hold as a matter of law that ouster should be presumed in the present case. All that is known is that for many years the plaintiffs did not receive the profits of their share. In our opinion the view taken by the Additional Judge was correct. We dismiss this appeal with costs.

A. I. R. 1915 Allahabad 139.

RICHARDS, C. J. AND BANERJI, J.

Mst. Phul Koer—Plaintiff-Appellant
v.

Hashmat Ullah Khan—Opposite Party-Respondent.

First Appeal No. 12 of 1915, decided on 13th May, 1915, from an order of the Sub. J., Aligarh, dated 24th October, 1914.

Civil P. C. (V of 1908), O. 9, R. 9 and O. 17, R. 2—Plaintiff and pleader remaining absent on adjourned hearing suit should be dismissed in default and not proceeded on merits.

* Where neither the plaintiff nor his Pleader appears on a day to which the hearing of a suit has been adjourned, the Court must make an order under O. IX, R. 8 and it is not entitled to proceed to decide the suit on the merits.

[P. 140, C. 1.]

L. R. Dube—for Appellant.

G. L. Agarwala—for Respondent.

Judgment :—This is an appeal against an order refusing to entertain an application under O. IX, R. 9, of the Code of Civil Procedure. The facts are as follows. The suit was a suit to recover a large sum alleged to be due on foot of two mortgages. One of the pleas raised by the defendant was that the plaintiff had not obtained a Succession Certificate to collect the debts. There seems to have been unavoidable delay in obtaining the certificate for which the plaintiff was not responsible, and the Court after hearing witnesses had allowed the plaintiff time to obtain a certificate on a number of occasions. Finally the 17th of July, 1914 was fixed. On that day neither the plaintiff nor the plaintiff's Pleaders appeared. The Court proceeded to decide

(1) (1915) 26 I. C. 922.

(2) (1905) 29 Bom. 300=7 Bom. L. R. 252.

the case on the merits. It found that the bond was duly executed, that the amount was due but that the Succession Certificate not having been obtained, the plaintiff was not entitled to succeed. The Court made a decree dismissing the suit with costs. The plaintiff then made an application under O. IX, R. 9. The learned Subordinate Judge was of opinion that O. IX, R. 9, did not apply and dismissed the application with costs. It is from this order that the present appeal is taken. Order XVII, R. 2, provides as follows: "Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by O. IX, or make such other order as it thinks fit." In our opinion if the Court intends to dispose of the case where neither the plaintiff, nor the Pleader, appears on a day to which the hearing of the suit has been adjourned, it must make an order under O. IX, R. 8. It is not entitled to proceed to decide the suit on the merits. It is contended that the concluding words of the rule "or make such order as it thinks fit" entitle the Court to decide the case. We do not think that this is the true construction of these words. In the very next rule where it is intended that the Court should decide the suit, the words used are different. The Court is directed to "proceed to decide the suit forthwith." In our opinion, therefore the Court below ought not to have decided the suit on the merits but ought, if it did not intend to give the plaintiff or her Pleader any other opportunity of appearing, to have dismissed the suit for "default of appearance." Had it done so, the plaintiff would have had a right to make an application under O. IX, R. 9, and that application would have been decided on its merits. It is contended on behalf of the respondents that the Court, rightly or wrongly, having made a decree, the proper remedy was to appeal from the decree. There is considerable force in this argument. We find, however, that when the application was made to the Court below, the applicant asked that the application should be treated as an application for a review of judgment. We think under the peculiar circumstances of this case and having regard to the fact that the decree of the Court below was not justified by law, it ought to have treated the application as

one for a review of judgment, particularly when the plaintiff's Pleader asked that that should be done. We think the justice of the present case will be met by sending back the case to the Court below with directions to treat the application as one for review of judgment. It is stated that there is already pending an application for a review of judgment in the Court below. If this be the case, the Court can put up both matters and dispose of them at the same time. We accordingly allow the appeal, set aside the order appealed from and remand the case with directions to the Court below to readmit the application and treat it as one for review of judgment. We make no order as to costs.

Appeal allowed.

A. I. R. 1915 Allahabad 140.

BANERJI, J.

Dina—Defendant No. 1—Appellant

v.

Harkishen Das and others—Plaintiff and Defendants 2 and 3—Respondents.

Second Appeal No. 345 of 1914, decided on 9th February, 1915, from the decision of the Dist. J., Benares, dated 21st February, 1914.

(a) *Agra Tenancy Act (II of 1901), Ss. 57 (b) 177*—*In suit for ejectment for converting land to non agricultural purpose appeal lies to District Judge.*

Where the plaintiff sought to eject the defendants in the Revenue Court on the ground that they had committed acts inconsistent with the purpose for which the land had been leased.

Held, that an appeal lay to the District Judge. (1 I. C. 161 Dist.) [P. 141, C. 2.]

(b) *Agra Tenancy Act (II of 1901), S. 57 (b)*—*Using portion for brick kilns is conversion to non-agricultural purpose—Tenant is liable to be ejected from whole.*

Where a land was let for agricultural purposes and the lessee converted a portion of the land into brickfield:

Held, that the conversion was clearly an act detrimental to the land and was inconsistent with the purpose for which it was let and that the lessee was liable to be ejected from the entire holding and not from the portion only.

[P. 141, C. 2 & P. 142, C. 1.]

Braj Nath Vyas—for Appellant.

Parmeshwar Dayal for Gokul Prasad—for Respondents.

Judgment:—The plaintiff-respondent granted a perpetual lease to the appellant

in respect of fourteen plots of land covering an area of 12.54 acres. The appellant sublet two of these plots, the area of which is 1.58 acres, to the defendants Nos. 2 and 3 for the purpose of making bricks and setting up brick-kilns. The defendants Nos. 2 and 3 converted these plots into a brick-field, and thereupon the suit out of which this appeal has arisen was brought by the plaintiff against all the defendants for their ejection from the entire holding, on the ground that the defendants had done an act detrimental to the land in the holding and inconsistent with the purpose for which it had been let. The suit purported to be one under S. 57, Cl. (b), of the Agra Tenancy Act. The Court of first instance decreed the claim for ejection, but ordered the defendant appellant to pay compensation to the plaintiff and directed that upon payment of compensation ejection shall not take place. On appeal the learned District Judge affirmed the decree for ejection, but gave the defendant-appellant liberty to remove the brick-kilns, and restore the land to the condition in which it was before it had been converted into a brick-field. The defendant No. 1 has preferred this appeal. The first contention put forward on his behalf is that the appeal from the decree of the Court of first instance did not lie to the District Judge but lay to the Commissioner. This contention is, in my opinion, untenable. As I have said above, the suit was brought on the ground that by reason of the defendant having done an act detrimental to the land in his holding and inconsistent with the purpose for which it was let, he had rendered himself liable to ejection under S. 57, Cl. (b). A suit for ejection on one of the grounds specified in Cl. (b) of S. 57 is one of the suits mentioned in group B of the fourth Schedule to the Tenancy Act and on appeal from the decree in such a suit lies to the District Judge. In a suit of this description the sub-lessees from the tenant should, as provided in S. 64 of the Act, be joined as parties, so that the circumstance of the sub-lessees being made defendants to the suit did not alter its nature. It was not a suit on the ground that the tenant had sub-let in contravention of the provisions of the Act and did not come within the purview of Cl. (d) of S. 57. The learned Vakil for the appellant has referred to the ruling in *Lachman Das v. Nabi Bax* (1). That case has, in

my opinion, no application to the present, inasmuch as it was held in that case that it was a suit in which the land-holder sued for ejection of the tenant and his subtenants on the ground mentioned in Cl. (d) of S. 57 and was a suit under S. 31 (2), an appeal from a decree in which lay to the Commissioner. The present case, as I have said above, is a case in which the plaintiff sought to eject the defendants on the ground that they had committed the acts mentioned in Cl. (b) of S. 57. The appeal, therefore, lay to the District Judge.

The next contention on behalf of the appellant is that the defendants have done nothing detrimental to the holding or inconsistent with the purpose for which the land was let and that the lease granted to the defendant appellant was not a lease for agricultural purposes but permitted the defendant to build on the land and do any other act he liked in regard to it. This contention, which was also raised in the Court below, has, in my opinion, been rightly repelled by that Court. From the terms of the lease it appears that it was taken for agricultural purposes. In the preamble of the lease it is stated that the defendant had asked that he should be given a right to cultivate the land, so that the main object of the letting was agricultural. No doubt the tenant was permitted to sink wells or make constructions on the land, but these apparently were ancillary to the main object of the tenancy, *viz.*, agriculture. The buildings which might be erected were apparently buildings for keeping cattle or implements of husbandry. Using a part of the land as a brick-field was clearly an act detrimental to the land for agricultural purposes and inconsistent with the purpose for which the land was let. The appellant, therefore, in granting a sub-lease for the making of bricks committed an act detrimental to the land leased out to him and became liable to ejection from his holding. The learned Judge has allowed the defendant to restore the land to its original condition and has provided in the decree that if this be done, the decree shall not be executed for his ejection. This he has done in exercise of the powers vested in him by S. 65. It is urged that the omission to restore the land sub-let to the defendants Nos. 2 and 3 to its former condition should entail the ejection of the appellant from that portion of his holding only and not from the entire holding. I cannot agree with this

contention. Under S. 57, Cl. (b), a tenant is liable to ejectment from his holding on the ground of any act or omission detrimental to the land in that holding. If any such act is done in respect of a part of the holding, he is liable to ejectment from the entire holding and not from that portion only. As the holding was one entire holding for which a lump sum was to be paid as rent, the Court could not order the appellant's ejectment from a portion only of the holding and apportion the rent, thereby substituting a different contract of tenancy for that into which the parties had entered. I accordingly dismiss the appeal with costs, including fees on the higher scale, but extend the time for restoring the land to its former condition to four months from this date.

Appeal dismissed.

A. I. R. 1915 Allahabad 142.

RICHARDS, C. J. AND TUDBALL, J.

Marram Khan and another—Plaintiffs-Appellants

v.

Sakhawat Khan and others—Defendants-Respondents.

Second Appeal No. 826 of 1914, decided on 26th May, 1915, from a decision of the Dist. J., Azamgarh, dated 17th March, 1913.

Pre-emption—Wajib-ul-arz—Giving right of pre-emption in case of mortgage right is not enforceable in case of simple mortgage.

Where a clause in the *Wajib-ul-arz* of 1875 gave a right of pre-emption in the case of "rehan" (mortgage):

Held, that the right could not be exercised if the transaction was a simple mortgage as defined in the Transfer of Property Act of 1882.

[P. 142, C. 2.]

Abdul Raoof—for Appellants.

S. N. Sen—for Respondents.

Judgment:—This appeal arises out of a suit for pre-emption. The plaintiffs alleged that the transaction between the defendants was in reality a usufructuary mortgage dressed up in the guise of a simple mortgage, so as to defeat their right of pre-emption. They went on further to say that even if the Court found that the transaction was a simple mortgage, they had a right to be substituted in the mortgage. The lower Appellate Court has found as a matter of fact that the transaction was a simple mort-

gage, and this finding is binding upon us in second appeal.

It is contended, however, on behalf of the appellants that even on this finding the plaintiffs are entitled to pre-empt the mortgage. We shall assume for the purposes of the present appeal that some right of pre-emption does exist. We shall also assume that this right of pre-emption extends to the case of a usufructuary mortgage. The question remains, have the plaintiffs satisfactorily proved the existence of a custom applying to the case of a simple mortgage? The evidence in support consists of an extract from the *wajib-ul-arz* of 1875. This entry records rights of pre-emption in the case of sale, mortgage and conditional sale. With regard to mortgage the expression used is "rehan". At the present time no doubt this expression is capable of including any transaction which is a "mortgage" within the meaning of the Transfer of Property Act, but it is an expression which would have been hardly appropriate to a simple mortgage in the year 1875. It is an expression which most people would understand when used by villagers as meaning a usufructuary mortgage. That this is not an unreasonable view of the case is clearly shown by what happened in the Court below. All the arguments and the evidence centred round the question whether the transaction was a simple mortgage or a usufructuary mortgage. This was the only point argued in the Court below, and it seems as if it were there conceded that unless the Court held the transaction to be a usufructuary mortgage, the plaintiffs had no case. In our opinion the plaintiffs failed to prove, by the evidence they adduced, the existence of a custom entitling pre-emption in the case of a simple mortgage.

The appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 143 (1).

RICHARDS, C. J. AND TUDBALL, J.

Din Dayal—Defendant-Appellant

v.

Ramdhan (Plaintiff) and another (Defendants)—Respondents.

First Appeal No. 225 of 1913, decided on 9th February, 1915, from an order of the J., Azamgarh, dated 31st July, 1913.

(a) *Pre-emption—Burden of proof of existence of custom and also existence of right against co-sharer is on plaintiff—Wajib-ul-arz of doubtful meaning is not sufficient.*

In a suit for pre-emption against another co-sharer it lies upon the plaintiff to prove not only that a custom of pre-emption exists, but that there is a custom under which he has a right to pre-empt as against another co-sharer.

[P. 143, C. 1.]

Therefore, in such a case the mere production of an entry in a *wajib-ul-arz* the meaning of which is more than doubtful, is not sufficient to discharge the onus which lies on the plaintiff.

[P. 143, C. 2.]

(b) *Pre-emption—Wajib-ul-arz—Construction—Words “karibi and baidi” are ambiguous.*

The expressions *karibi* and *baidi* are ambiguous expressions and they may refer to nearness or distance in space or nearness or distance in relationship.

[P. 143, C. 2.]

Iqbal Ahmad—for Appellant.*Hamilton*—for Respondents.

Judgment:—This appeal arises out of a suit for pre-emption. The plaintiff and the vendee are both co-sharers and the former stated in his evidence that he was also a relation. An entry in the *wajib-ul-arz* records a right of pre-emption first in the *hissadar karibi* and then *hissadar baidi*. It appears that at one time there were a number of sub-divisions of the *mahul* which have now ceased to exist. The Court of first instance dismissed the plaintiff's suit, holding that a custom giving the plaintiff a preferential right over the defendant was not proved. The lower Appellate Court reversed the decree of the Court of first instance and remanded the case. The vendee comes here in appeal.

We think that the decree of the Court of first instance was correct and ought to be restored. It lay upon the plaintiff to prove not only that a custom of pre-emption existed, but that there was a custom under which he had a right to pre-empt as against another co-sharer. The only evidence he adduced was the extract from the *wajib-ul-arz*. This extract contains the expressions “*karibi*” and “*baidi*”. They

are ambiguous expressions which may refer to nearness or distance in space, or nearness or distance in relationship. The opening paragraph of the plaintiff's own plaint would seem to show that he then attributed the meaning of “space” to the expressions and not that of “relationship”. The written statement of the defendant shows that he also attributed this meaning to the expressions. In our opinion it cannot be said that the plaintiff by production of an entry, the meaning of which was more than doubtful, discharged the onus which lay upon him.

We allow the appeal, set aside the order of the Court below and restore the decree of the Court of first instance with costs in all Courts.

*Appeal allowed.***A. I. R. 1915 Allahabad 143 (2).**

BANERJI, J.

Talaimand Singh and others—Plaintiffs-Appellants

v.

Gobind Singh and others—Defendants-Respondents.

Civil Revn. Petn. No. 17 of 1915, decided on 19th April, 1915, from an order of the Small Cause Court J., Azamgarh, dated 3rd November, 1914.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Arts. 41 and 42 except suit for contribution of mortgage debt by co-mortgagor.

A suit by one co-mortgagor against the other co-mortgagors for contribution in respect of money paid by him to discharge a decree obtained on their joint mortgage is not cognizable by a Small Cause Court.

[P. 144, C. 1.]

Hamid Ullah—for Appellants.*Iqbal Ahmad*—for Respondents.

Judgment:—This is an application for revision, and the only ground pressed is that the suit was not cognizable by the Court of Small Causes in which it was instituted, so that that Court had no jurisdiction to entertain the suit. In my opinion the plea raised is a valid one. There was a decree obtained against the parties to this suit upon a mortgage of 1891, which directed the mortgage property to be sold. The plaintiffs' case was that this property belonged to both the parties and that as it was advertised for sale, they (the plaintiffs) had to discharge the amount of the decree in order to save the property from auction-sale; that they

paid on account of defendants' share of the property a sum of Rs. 353-2-11 and that they were entitled to recover this sum from the defendants. The suit was to recover this sum of Rs. 353-2-11, and a further amount. The case is clearly one covered by Art. 41 of Schedule II to the Provincial Small Cause Courts Act. It was a suit for contribution by a co-sharer in joint property in respect of a payment made by him of money due from a co-sharer. If the plaintiffs' allegation is true, they as co-sharers had to pay money payable by the defendants who were their co-sharers in the property, and they claimed contribution in respect of the payment made by them. In any case it is a suit covered by Art. 42, being in substance a suit by one of several joint mortgagors for contribution in respect of money paid by him for the redemption of the mortgaged property. The effect of the payment alleged to have been made by the plaintiffs was to redeem the property from the mortgage under which it was ordered to be sold. Therefore, the suit was one which was not cognizable by the Court of Small Causes and that Court had no jurisdiction to try it. It is true that it was the applicants themselves who instituted the suit in the Court of Small Causes, but that did not give the Court jurisdiction to try it. I accordingly direct that the case be sent back to the Court below with directions to return the plaint to the plaintiffs for presentation in the proper Court. As it was the plaintiffs themselves who brought the suit in the Court below, they must bear all the costs of the respondents including costs in this Court.

Case sent back.

A. I. R. 1915 Allahabad 144.

KNOX, J.

Abdul Khaliq—Petitioner

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 17 of 1915, decided on 10th February, 1915, from the order of the S. J., Mainpuri.

(a) *Criminal P. C. (V of 1898), S. 110*—In case under S. 110 where evidence is available police officer's evidence and police diaries should not be relied upon.

Evidence of a Police officer in a case under S. 110 of the Criminal Procedure Code, when it is based upon hearsay rumour and above all on diaries, is of infinitesimal value, more particularly where other evidence is available.

(b) *Criminal P. C. (V of 1898), S. 162*—Police diaries may be used for the accused but dangerous to use against accused.

Police diaries may be of use when a Judge has to decide about the guilt of an accused person and they contain matter which seems to point in the opposite direction, but they are dangerous evidence against a person.

Wallach—for Petitioner.

Satyachandra Mukerji—for Opposite Party.

Judgment :—In the month of May, 1914, a case under S. 110 of the Code of Criminal Procedure was pending before a Magistrate of the first Class of Mainpuri.

The person against whom proceedings were instituted was Khalaq Singh, a *thakur*, and he was called upon to show cause why security should not be taken from him on the ground that he was a habitual dacoit and an associate of dacoits and the people of the neighbourhood were in terror of him.

The case was partly heard by Babu Raj Bahadur and partly by Thakur Hukum Singh. Thakur Hukum Singh came to the conclusion that none of the charges alleged by the prosecution had been made out or established against the accused. He found him to be a man of position, good life and family and he was not a person to be bound over under S. 110, and he accordingly discharged the order made against him calling upon him to show cause.

These proceedings came to an end on the 19th of May, 1914.

Somewhere in July, 1914, Khalaq Singh applied for sanction to prosecute Abdul Khaliq, Circle Inspector, for having committed an offence under S. 193 of the Indian Penal Code.

Babu Raj Bahadur Singh refused to entertain this application. The grounds on which he refused to entertain it were two-fold. The learned Magistrate thought that Abdul Khaliq had probably made inquiries in some dacoity case and that what he deposed might have been learnt and come to his knowledge during those inquiries. The second ground was that there was nothing on the record to show that Abdul Khaliq had made two contradictory statements in the course of a judicial proceeding. Khalaq Singh then went to the District and Sessions Judge of Mainpuri, asking that the order of Babu Raj Bahadur might be set aside and sanction might be given to prosecute Abdul

Khalik under S. 193. There is nothing in the petition laid before the District and Sessions Judge in which the statements supposed to be perjuries are to be found but I am told that they are to be found, in the petition made to Babu Raj Bahadur and that they are as follows—“(1) I know Khalaq Singh accused. He is in the habit of committing dacoity. (2) There is a general complaint against him of committing dacoity and people fear him. (3) Khalaq Singh was suspected in the Nabigunj dacoity case, also in the Yamudandi case, also in the Namkarari case. (4) The complainant (apparently in the Nabigunj case) put his suspicion on Khalaq Singh in the beginning, middle and end of the inquiry. (5) Names of the persons whom Murli took in the dacoity were the enemies of Murli. (6) Kandora was not a servant of his when Nabi Singh was arrested.”

How far these statements are the *ipsissima verba* used by Abdul Khaliq I do not know. I have not compared them with the original record, and I have not been asked to compare them by the learned Advocate who appears for Abdul Khaliq nor by the learned Vakil who appears on the other side.

It was for the petitioner, Kuar Khalaq Singh, to satisfy the Courts before whom he pressed his application that there was a *prima facie* case of perjury with regard to each one of those statements put into the mouth of Abdul Khaliq. So far as I can judge, the Magistrate dealt with the case in a very proper manner. It is to be regretted that he did not deal with the case, when it was before him under S. 110 in an equally succinct and common sense way. He was satisfied, and it must be remembered that most of the evidence had been recorded by him, that it was quite possible with reference to each one of those statements that Abdul Khaliq was deposing to what he came to know during the inquiry and that there was nothing in the statements which could not be explained away and honestly explained in this way. I admit that the fourth statement, if it has been correctly stated before me, is not so easily explained; but the misfortune is that, so I am told, there was no cross-examination of Abdul Khaliq to show on what foundation he based the several statements made by him.

To my mind it is always strange that Magistrates in the present day attach so much weight and examine at such in-

ordinate length the Police officers who appear before them in proceedings under S. 110. Those officers, generally speaking, know nothing more than this that there is current in their Circle a rumour to the effect that a certain person is an associate of bad characters or otherwise a person who needs watching under that section.

There may be cases in which such officers do see something with their own eyes and in that case their evidence is of course valuable; but when it is evidence based upon hearsay rumour and above all on diaries, it is of infinitesimal value, more particularly where there is evidence available, as I understand there was in this case, of, certain number of witnesses who were not Police officers who came forward on either side.

It is the custom now, so far as I have seen in cases coming before me, to have 30 or 40 witnesses on one side and to have as many as 40 or 50 witnesses on the other side, as though proceedings under S. 110 were best judged by the number of witnesses.

In the judgment recorded by Mr. Hukum Singh there is this clear defect that he deals with the case mainly upon the Police diaries and upon little else. His judgment is an apology for the diaries showing that they are entitled to be ranked as the best evidence in the case. Police diaries are sometimes of use when one has to decide about the guilt of an accused person and they contain matter which seems to point in the opposite direction, but so far as my experience goes they are dangerous evidence against a person. I am not dealing with a case in which the diaries are the diaries of the investigating officer and the question is how far he is responsible for what is contained in them; that is quite another story. Abdul Khaliq had nothing to do with these diaries except to review them after they had been written by others. Nothing in the diaries is put before me as his own personal knowledge. I do not for a moment suggest that the decision arrived at in the long run by Hukum Singh as regards the reputation of Khalaq Singh is in any way wrong, that is not a matter before me to-day, but there is nothing in his very lengthy judgment which gives ground for a *prima facie* conclusion that Abdul Khaliq has committed perjury in the evidence which he gave before Babu Raj Bahadur. Nothing whatever of this kind has been pointed out to me and it was very properly stated before me that if the

Police diaries be taken out of the judgment, there remains no foundation on which a sanction for prosecution can safely be based.

The learned Judge never seems to have had before his mind the first ground on which sanction was refused, he dealt only with the second ground and his judgment is that the Sub-Divisional Officer, instead of going into the merits, threw the application out on the ground that there were not two mutually contradictory statements. As I read the judgment of the first Court the strong point in the judgment is that statements made by Abdul Khaliq might well have been made from inferences which came before him *alivunde*.

The case is certainly not one in which sanction should have been given under S. 193. The Magistrate who heard the evidence evidently did not consider that he could take upon himself the responsibility of acting under S. 476. On every ground, therefore, I hold that this application for revision of the order of the Sessions Judge of Mainpuri is a good and proper application.

I set aside the order and revoke the sanction which has been given.

Sanction revoked.

A. I. R. 1915 Allahabad 146.

PIGGOTT, J.

Ram Raja Dat—Appellant

v.

Sheo Dayal—Opposite Party.

Criminal Appeal No. 275 of 1915, decided on 30th April, 1915, from the order of the S. J., Banda, dated 27th February, 1915.

Criminal P. C. (V of 1898), S. 195 (6)—Superior Court to reconsider facts, lower Court's opinion, and propriety of sanction.

A Court of superior jurisdiction whose jurisdiction is invoked under S. 195 (6) of the Code of Criminal Procedure should re-consider the entire matter on the merits and while allowing all reasonable weight to the opinion of the Court below, it should nevertheless re-consider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts.

P. L. Banerji—for Appellant.

R. K. Sorabji—for Respondent.

Judgment :—This is an application under the sixth clause of S. 195 of the Code

of Criminal Procedure, asking this Court to revoke an order passed by the Sessions Judge of Banda sanctioning the prosecution of one Ram Raja Dat for having committed the offence of giving false evidence in a deposition made by him on the 12th of August, 1914, in the Court of a Magistrate subordinate to that Court. The case came before the Sessions Judge in appeal and hence he has dealt with the application for sanction. He was fully empowered to do so; but it is worth noticing that the evidence given by Ram Raja Dat was believed and acted upon by the Magistrate who heard it. I wish also to note that I look upon an application under S. 195, Cl. (6), as standing on a very different footing from an application in revision. The right conferred by the clause above-mentioned may not be exactly a right of appeal, but it is strongly analogous to such right. I think the Legislature intended that a Court of superior jurisdiction whose jurisdiction was invoked under S. 195, Cl. (6), of the Code of Criminal Procedure, should re-consider the entire matter on the merits and while allowing all reasonable weight to the opinion of the Court below, should nevertheless re-consider the question of the propriety of the order of sanction on its merits upon a complete review of the entire facts. The proceedings out of which the matter now before me has arisen have been of considerable duration and occupied the attention of several Courts. It appears that a dispute arose on the death of one *Mt. Beni Bai*, who was a tenant holding lands as an ex-proprietor, as an occupancy tenant and also as a tenant-at-will. The dispute which arose on her death was as to whether she had or had not left any heir entitled to succeed to her interests as ex-proprietary tenant, occupancy tenant and non-occupancy tenant under the provisions of the Agra Tenancy Act (Local Act II of 1901). The applicant Ram Raja Dat was a collateral of Beni Bai and was a possible successor to her tenancy, provided that he had shared in the cultivation of the tenancy at the time of the lady's death. In the village papers he stood recorded as a sub-tenant of the holding. A dispute between Ram Raja Dat and the *zemindar* Chaudhri Baldeo Prasad, was fought out in the Court of an Assistant Collector of the first Class upon an application for mutation of names under the Land Revenue Act. The enquiry resulted in a clear finding in favour of Ram Raja Dat, whose

name was ordered to be recorded in place of *Mt. Beni Bai* deceased in all *khalas*, and with same rights as the deceased lady. That order was never appealed against, nor does it appear that any attempt has been made up to the present to get the question re-litigated by means of any proceedings under the Agra Tenancy Act. What happened was that the Assistant Collector formed a very unfavourable opinion with regard to certain evidence given by Sheo Dayal, *patwari* of the village, in the course of the inquiry before him. He directed the prosecution of Sheo Dayal upon charges of forgery and of giving false evidence. It was before the Magistrate enquiring into these charges that Ram Raja Dat made a statement in respect of which it is now sought to prosecute him. Sheo Dayal was convicted in the Magistrate's Court in respect of a charge under S. 193, Indian Penal Code, but was acquitted by the Sessions Judge on appeal. He is now the applicant in favour of whom the sanction in question before me has been granted. The statement in respect of which Ram Raja Dat has been ordered to be prosecuted is in the following words: "I did not pay any rent to *Mt. Beni Bai*. I was not her sub-tenant. The word 'sub-tenant' against my name in the coupon of the money order as to 1319 *Fasli* was written by *dhoka*." It may be explained at once that, for three consecutive years, rent due from *Mt. Beni Bai* on account of her holding or holdings was remitted by Ram Raja Dat direct to the *zamindar* by means of money orders. In filling up the prescribed form for one of these money orders, namely, that one by which rent for 1319 *Fasli* was remitted, Rama Raja Dat described the rent as due from *Mt. Beni Bai*, tenant, paid through Ram Raja Dat, sub-tenant. Apart from this document it would seem that the only evidence available to support the charge in respect of which the prosecution of Ram Raja Dat has been sanctioned is to be found in the oral evidence which may be expected to be given by Sheo Dayal *Patwari* and by the two witnesses who were produced by the said Sheo Dayal as his defence witnesses when he himself was on his trial: that is to say, the two witnesses in question were not heard of during the enquiry before the Assistant Collector and appeared in evidence for the first time in Sheo Dayal's defence, after Ram Raja Dat as well as other witnesses had been examined for the prosecution in the case in which Sheo

Dayal was accused. From the records before me it appears that what Sheo Dayal and his two witnesses are prepared to assert is something as follows: that a certain sum of Rs. 23-4-5, which happened to be rent due from *Mt. Beni Bai* to her *zamindar*, was paid by Ram Raja Dat to that lady in the presence of the *patwari*, was entered by the latter in his papers as a payment from a sub-tenant to the tenant-in-chief and that the thumb-impression of *Mt. Beni Bai* was thereupon taken on the *patwari's sryaha*, in order to attest this payment. The money itself, however, was there and then handed back by *Mt. Beni Bai* to Ram Raja Dat, with a request that he should forward it by money order to the *zamindar* in payment of the rent due to the latter from *Mt. Beni Bai* herself. So far as the papers before me show, no explanation has yet been suggested as to why the payment Ram Raja Dat is supposed to have made as a sub-tenant should have amounted to precisely the rent due for the year from the tenant-in-chief to the *zemindar*. It is clear also that, once Sheo Dayal and his fellow-witnesses coming to Court with this story, they will be faced by the fact that the thumb-impression taken on the *patwari's sryaha* has already been judicially examined and found not to be what they said it was, namely, the impression of the left thumb of *Mt. Beni Bai*. This statement of the facts is sufficient to show that the evidence available on behalf of the prosecution as against Ram Raja Dat is not particularly strong or free from suspicion. It is necessary also to consider what are precisely the statements in respect of which it is desired to prosecute Ram Raja Dat. He said, first of all, "I did not pay any rent to *Beni Bai*" beyond the fact that he three times sent rent due from that lady to the *zemindar* direct to the latter, the only evidence forthcoming to show that this statement was false is that of the witnesses who deposed to the incident already described. Now Ram Raja Dat made this statement as a prosecution witness against Sheo Dayal. Assuming as it seems proper to assume, that the two witnesses subsequently produced in Sheo Dayal's defence were not invented after the charge had been framed, then the facts to which they were prepared to depose must have been known to Sheo Dayal and his legal adviser while Ram Raja Dat was in the witness-box and subject to cross-examination. From the point of view of the defence the statement, "I did

not pay any rent to Beni Bai," was quibble or evasion, intended to keep the actual facts as to payment of rent for 1319 *Fash*, if possible, from the knowledge of the Court. If it was intended to make that statement hereafter the basis of a prosecution for perjury, it was highly incumbent on the defence to cross-examine the witness in such a manner as would close all avenues of escape behind him, if he was wilfully lying, or would bring the facts clearly to his recollection if he was speaking hastily and in forgetfulness of the precise facts. The importance of paving the way for a subsequent prosecution by a careful and intelligent use of the right of cross-examination seems to be very imperfectly understood in many Subordinate Courts in this country. Ram Raja Dat's *next* statement requiring to be considered is, "I was not her sub-tenant." This is not altogether a pure statement of fact. From one point of view it is a mixed proposition of fact and of law. One thing known for certain at the present stage of this litigation is that the only Court competent by law to pronounce on the correctness of this proposition, which has hitherto dealt with the matter, has given a decision in Ram Raja Dat's favour. The *third* statement to be considered is that on the money order coupon already referred to Ram Raja Dat wrote himself down as a sub-tenant "*dhoka se*," that is to say, by mistake, or through some misunderstanding. From any possible point of view this assertion seems to me to be not a false statement, but a plain truism. I do not think this is a suitable case for a prosecution and I revoke the order of sanction passed by the Court below.

Order revoked.

A. I. R. 1915 Allahabad 148.

RICHARDS, C. J., AND BANERJI, J.

Parsotam Rao Tantia and another—
Defendants-Appellants

v.

*Radha Bai and another—*Plaintiffs-
Respondents.

First Appeal No. 269 of 1913, decided on 9th March, 1915, from the decision of the Sub-J., Cawnpore.

Limitation Act (IX of 1908), Arts. 120 and 62—Three brothers holding specific shares, one managing them—Manager receiving interest on investments—Suit for share is suit for partition and governed by Art. 120.

N made a Will in which he divided up his property between his three sons, R, V and P but urged them to continue to live together in an amicable and friendly way. The property was managed by one member of the family P. He received the rents and profits of the immoveable property and invested them in the ordinary course of business. He had invested a considerable sum of money in Railway Debentures and more than three years after he received the money from Government in redemption of the Debentures, the widow of a son of one of the brothers claimed to be put into possession of a third of specific portions of the property:

Held, that the suit was in reality a suit for partition of the movable and immovable property and was governed by Art. 120 of Sch. I of the Limitation Act.

S. C. Banerji—for Appellants.

Moti Lal Nehru—for Respondents.

Judgment:—This appeal arises out of a suit which related to property which at one time belonged to a man named Nana Narayan Rao. We do not for the moment specify the exact nature of the suit, inasmuch as our decision upon a law point raised by the appellants depends to some extent upon the view we take of the nature of the suit. Nana Narayan Rao made a Will in which he divided up his property between his three sons, Ram Chander Rao, Vasudeva Rao and the defendant, Parsotam Rao Tantia. Whilst dividing up the property he urged his family to continue to live together in an amicable and friendly way. There has been a good deal of litigation between the members of this family. In the first place a suit was brought by Ram Chander Rao, which was continued after his death in the name of his widow, Janki Bai. Partition of the family property, or so much of it as had not already been divided by the Will, was claimed. Madho Rao and Parsotam Rao were defendants to that suit. It was pleaded by way of defence that the family constituted a joint Hindu family and that *Mt. Janki* as the widow of Ram Chander had no right to anything save maintenance. It was decided that the family was separate. Again Parsotam Rao brought a suit against Radha Bai (the present plaintiff), widow of Madho Rao, after the death of the latter for a declaration that the family was joint and that the widow, Radha Bai, had no interest. It was again decided that the family was separate. In the present suit the defendant, Parsotam Rao, pleads once more that the family is joint. In our opinion on the evidence and also as the result of the previous litigation we entirely agree with the decision of

the Court below that Ram Chander Rao, Vasudeva Rao and Parsotam Rao, the three sons of Nana Narayan Rao, did not constitute a joint Hindu family according to Hindu Law, in that they had specific shares in the property. Nevertheless while the family was in law separate, in many respects it differed very little from a joint Hindu family. So long as the three brothers lived they appear to have been on friendly terms and it was only shortly before the death of Ram Chander that he brought a suit for partition. The Court below has found, and we entirely agree with its finding, that the greater part, if not the whole of the property, was managed by one member of the family, who occupied the position of a manager. The family nevertheless was separate, because notwithstanding the mode of enjoyment and management they were entitled to the property in specific shares. When the present suit was instituted there had already been a considerable amount of litigation and the Courts had held that the family was not joint, and in bringing her present suit the plaintiff has claimed to be put into possession of a third of specific portions of the property. Amongst the items of property claimed was the sum of Rs. 69,790-8-8. This claim was in respect of certain debentures in the Cawnpore-Achnera State Railway. It appears that the defendant, Parsotam Rao, had invested the joint funds in debentures in this Railway. In course of time Government paid off the debentures at a substantial premium and the money was received by the defendant. The Court below decided in the first place that the family was separate. It has given the plaintiff a decree for partition of a portion of the immovable property and also for the sum of Rs. 69,790-8-8 mentioned above. It has made also a decree in respect of other items to which it is unnecessary specifically to refer at present. Agreeing as we do with the Court below the plaintiff was clearly entitled to partition, and in this respect we have no hesitation in saying that the decree of the Court below ought to be affirmed.

The appellants have contended very strongly that the Court below ought not to have made a decree in the plaintiff's favour for the sum of Rs. 69,790-8-8, on the ground that her claim in that respect was barred by limitation. The money was paid over to the defendant on or before June, 1908, and the present suit was not

instituted until the 2nd of April, 1909, that is to say, more than three years after the money was received by the defendant. The appellants accordingly contend that the plaintiff's claim in respect of the item was a claim for "money had and received for the use of the plaintiff" within the meaning of Art. 62 of Schedule I of the Limitation Act. The way in which the plaintiff claimed this sum lends some colour to this contention, and had the present suit been a suit simply to recover this sum of money upon the allegation that the plaintiff was entitled to one-third of the debentures and that all the redemption money had been paid to Parsotam as the person in whose name the debentures stood, we might have been inclined to agree with the contention of the defendant that the claim came within the purview of Art. 62 and that the suit ought to have been brought within three years. Reading, however, the plaint as a whole, and having regard to the nature of the evidence and the defence, we think that the suit was in reality a suit for partition of the movable and immovable property which had been held by the three brothers and in which the plaintiff's husband had a third share. We have already pointed out that the property was managed by one member of the family. He appears to have received the rents and profits of the immovable property and to have invested and dealt with their money-making investments in the ordinary course of business. When he received the money from Government in redemption of the debentures, he still received it in his capacity of manager. When we speak of manager, we do not mean the managing member of a joint Hindu family but the individual to whom this particular family entrusted the management of their affairs. In this view we think that the suit was a suit governed by Art. 120, which provides a period of six years limitation for all suits not specifically provided for by the other Articles in the Schedule.

There was one other item to which Dr. Banerji specifically called our attention, namely the *dera* (or collection house) in this village, Lalpur. Dr. Banerji contends on behalf of his clients that while the village of Lalpur was specifically bequeathed to the plaintiff's husband, nevertheless as collections generally of several of the villages were made at this house, it must be regarded as joint property and should have been partitioned. The learned

Subordinate Judge considers that the provisions of the Will ought to be given effect to, which specifically gave the village of Lalpur to the plaintiff, and that this house ought to be regarded as an appurtenant of that village. We see no reason to differ from the view taken by the learned Subordinate Judge. On full consideration of the entire case, we think the decree of the Court below ought to be affirmed in its entirety. We accordingly dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 150.

RICHARDS, C.J. AND TUDBALL, J.

Khayali Ram and another—Defendants-Appellants

v.

Kali Charan and others—Plaintiffs-Respondents.

Second Appeal No. 1284 of 1914, decided on 28th May, 1915, from the decree of the Dist. J., Mainpuri.

Pre-emption—Wajib-ul-arz — Right given to 'co-sharers in village' when village not partitioned—After partition co-sharer of another mahal not held entitled to pre-empt.

A *wajib-ul-arz* gave right of pre-emption first to own brothers and nephews, and then to cousins who were co-sharers, then to co-sharers in the *patti* and then to co-sharers in the village. At the time the *wajib-ul-arz* was prepared the village was not partitioned into several *mahals*, but subsequently it was so partitioned. A co-sharer in one *malhal* sued to pre-empt property in another *malhal* where he was not a co-sharer :

Held, that he had no right to pre-empt.

Girdharilal Agarwala—for Appellants.

Satish Chandra Banerji—for Respondents.

Judgment :—This appeal arises out of a suit for pre-emption. The plaintiff is not a co-sharer in the *malhal* although he is a proprietor in the village. The vendees also are not co-sharers in the same *malhal*. They are stated to be grove-holders in another *malhal*. The plaintiff adduced in evidence an entry in the *wajib-ul-arz* of 1873. This records that there is a right of pre-emption first with own brothers and nephews, then with cousins who are co-sharers, then with co-sharers in the *patti* and then with co-sharers in the village.

At that time the village consisted of one *malhal*, which was sub-divided into two *pattis*. We may point out here that the Court below has made a very important mistake. It states that the village was then divided into two *mahals*. The other evidence in support of the existence of the custom consisted of the *wajib-ul-arz* which was framed at the last Settlement. By this time the village had been divided into a number of different *mahals* and at the time of the Settlement a new *wajib-ul-arz* was drawn up for each of the new *mahals* in similar terms. In each of these *wajib-ul-arzis* it is recorded that the old custom should remain in force. The question is whether the plaintiff has proved by these two entries the existence of a custom which gave him a right to pre-empt this property against the defendants, he not being a co-sharer in the same *malhal*. We agree that whatever the custom was prior to the partition it still continued. We have to see what that custom was. The only evidence being the entry in the *wajib-ul-arz*, we must look to this document in order to find out what the custom (if any) was. It is not contended in the present case that either parties are related to the vendor. Therefore that part of the *wajib-ul-arz* which refers to relationship may be left out of consideration. It is quite clear that the remaining part refers entirely to a custom existing between co-sharers, because at that time all the proprietors in the village were co-sharers with each other. In the events which have happened the plaintiff is no longer a co-sharer with the vendor. He has ceased to have any community of interest with him. In this view it seems perfectly clear that there was no evidence of the existence of a custom between persons who are not co-sharers. After partition has taken place the owner in one *malhal*, is no longer able to bring himself within the custom where the property sold is situate in the other *malhal*. We allow the appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's suit with costs in all Courts.

Appeal decreed.

A. I. R. 1915 Allahabad 151.

TUDBALL AND RAFIQUE, JJ.

Gajadhar—Defendant-Appellant

v.

Kishori Lal—Plaintiff-Respondent.

Second Appeal No. 928 of 1914, decided on 8th March, 1915, from a decree of the 2nd Addl. J., Aligarh.

(a) *Easements Act (V of 1882), Ss. 33 and 35—Ordinarily plaintiff entitled to injunction rather than damages—Plaintiff may content himself with damages but is not entitled to injunction unless damages under Chap. 9 are claimable*

In case of disturbance of an easement, ordinarily the plaintiff is entitled to an injunction rather than to damages. It is open to the plaintiff to be content with damages but under S. 35 of the Easements Act he is not entitled to an injunction except in such cases where he would be entitled to recover damages under Chapter IX of the Act.

(b) *Easements Act (V of 1882), S. 33—S. 33 requires substantial damage by disturbance.*

Section 33 of the Act allows compensation to be recovered for the disturbance of an easement provided that the disturbance has actually caused substantial damage to the plaintiff.

(c) *Maxims—Law does not notice trivial disturbance.*

De Minimis non curat lex:—The law does not concern itself with a disturbance which is trivial or immaterial.

(d) *Easements Act (V of 1882), S. 35—Defendant completing disturbance pending suit takes the risk.*

Where the plaintiff comes into Court at once when the disturbance of his easement is threatened and the defendant completes his construction pending the suit, he does so at his own peril.

Sundar Lal—for Appellant.

Satish Chandra Banerji, Motilal Nehru, Gulzari Lal, Sarat Chandra Chaudhri, Girdhari Lal and Peare Lal Banerji—for Respondent.

Judgment.:—The facts of this case are as follows:—The parties are next door neighbours, residing in two adjoining houses owned by them at Aligarh. They are of the same caste (Vaish Agarwal), the plaintiff being a member of the local Bar. Considering the trivial nature of the suit and the circumstances of the case it is evident that they are both obstinate, unreasonable men, for the matter in dispute is one that with the exercise of a little common sense and reason could and ought to be settled in a very few minutes. Their houses as pointed out adjoin. The ground

level of the plaintiff's house is considerably higher than that of the defendant's. The former's house is to the west of that of the latter. Originally neither house had an upper storey.

The eastern portion of the plaintiff's house with which we are concerned consists of two parallel rooms with a double verandah on the western side. The eastern of the two rooms opens into the other room which in turn opens into the verandah.

The only apertures in the former of these two rooms, whereby light and air can be admitted to it, are (1) the doorway or doorways leading into the second room and two very narrow small slits (called *roshandans* and said to be 8 inches high by 4 inches wide) in the eastern wall, situated just below the roof and overlooking the roof of the defendant's house.

The room as a consequence is very dark, so dark that it is impossible to read. It has been used so far as a store-room for grain etc. The other room is used for the storing of the apparel, etc., of the ladies of the household. Sometimes in the hot weather the ladies use this second room for the purpose presumably of escaping from the glare and heat of the oriental sun. Furthermore the rain water, which falls on the plaintiff's roof, had a mode of escape through two *parnalas* on the eastern side, i.e., through two holes in the parapet and thence down the side of the wall apparently on to the defendant's roof.

About 14 years ago the defendant built an upper storey to his house and this led to a dispute, as the plaintiff naturally wished to retain his right to light and air through the two slits or *roshandans* and also his right to discharge the rain water through the *parnalas*. A suit was brought and a compromise effected. The compromise is on the record. It was agreed that the defendant should so build that the roof of his upper storey should be at least six inches below the bottom level of the two slits and that he should not build a "*madgari*" or parapet on his roof adjoining the plaintiff's wall (the word used in vernacular is "*mulhak*"). The object of these stipulations about the "*madgari*" and the level of the roof was obviously to prevent the two *roshandans* from being blocked up and to prevent the rain water, which flows off the plaintiff's roof on to that of the defendant, from going through the *roshandans* into the plaintiff's room.

The defendant has now done three things. (1) He has put a new window in the north wall of his upper storey.

(2) He has built a new room with a wall 17 feet high on the roof of his upper storey. The western wall of his room is parallel to the eastern wall of the plaintiff's house and at a distance of 10 feet from it. Both the eastern and western walls of this new room have large openings blocked with iron gratings.

(3) He has raised the roof of his upper storey about six inches between the plaintiff's wall and the western wall of his new room; so that it is now on the same level as the lower edges of the two *roshandans*; but he has left a small drain six inches deep up against the plaintiff's wall (and parallel to it) and this he has continued along the side of his own roof so as to lead the rain water away into his own compound. The present suit was brought by the plaintiff when the new constructions were commenced, and he sought for a mandatory injunction to restrain the defendant from carrying out his intentions. He also applied for a temporary injunction pending the decision of the suit.

Apparently the raising of the roof by six inches and the opening of the new window had been completed and the new room had risen a few feet only when the Munsif went to the spot and viewed it.

The Munsif allowed the defendant to continue the building of the east, north and south walls of the new room, but forbade the building of the western wall pending the decision of the suit. He visited and examined the plaintiff's eastern room.

During the course of the suit he again inspected the premises and to see what would be the effect of the building of the western wall of the new room, he had the space, which it would occupy, filled with a *darri* and then he examined the plaintiff's room.

He found that the interference caused thereby in the supply of light through the two slits or *roshandans* was very slight indeed. *i. e.*, he found that in so far as the right to light and air through the two slits was concerned there had been no material interference with the plaintiff's physical comfort or such as to prevent him using the room as beneficially as he had been using it in the past.

He found in regard to the window that there was no invasion of the plaintiff's right of privacy.

In regard to the raising of the roof he concluded that the drain was too narrow and that the roof had been raised improperly.

He decided

(1) That there was no necessity to restrain the defendant from completing his new room and that Rs. 10 was sufficient compensation for the very slight invasion of the right to light and air.

(2) He dismissed the claim in respect to the window, holding that it had been in existence for six years before suit.

(3) He granted an injunction directing the defendant to lower the roof six inches and in addition to make a drain six inches deep in the roof after it had been so lowered and at a distance of one foot from plaintiff's wall. He decreed accordingly.

The plaintiff appealed and urged that he was entitled to an injunction in regard to the new room and also the new window. He also objected to the order as to costs. The defendant filed objections to the award of damages and the direction as to the roof and drain.

Pending the appeal the defendants finished the construction of the room. The lower Appellate Court held as follows:—

In regard to the window, that it had been made six years before suit and there had been no invasion of the plaintiff's privacy. It, therefore, disallowed the appeal on this point.

In regard to the question of light and air through the *roshandans* it seemed to be of opinion that the building of the western wall of the new room constituted a complete obstruction of both light and air, but did not base its decision on this. It held that the building of this room even at a distance of ten feet from the plaintiff's wall was a breach of the agreement between the parties in the former litigation, that the roof of the defendant's house was to be kept six inches below the level of the *roshandans*. That agreement or compromise was embodied in the decree in the former litigation. The Court, therefore, held that the defendant had no right to build a room anywhere on his roof at any distance whatsoever from the plaintiff's wall and as he had completed it during the suit, the plaintiff was entitled to a mandatory injunction for its demolition

and the prevention of any such construction in the future.

In regard to the raising of the level of the roof between the new room and the plaintiff's wall, it held that the first Court's order was bad in so far as it ordered the making of so deep a drain (as it would amount to demolishing the roof) and also as to the position ordered for the drain, i. e., one foot from the plaintiff's wall.

It directed that the drain should be two feet from this wall and that bricks should be put on both sides of it, but it did not lay down any depth for the drain nor can it be understood what it meant by saying that bricks should be put on both sides of the drain.

Plaintiff desires that the rain water from his roof shall be allowed to flow away on the defendant's roof in such a manner as to obviate any of it from finding its way through his wall into his room. The defendant appeals and the plaintiff has filed objections.

It is urged

(1) that the lower Appellate Court has completely misunderstood the former compromise; that it was never intended thereby to prevent the defendant from building a second storey provided this can be done without invading the plaintiff's rights in regard to light, air and flow of water;

(2) that there has clearly on the facts been no material invasion of any such right and the plaintiff has no cause of action;

(3) that in any case the plaintiff is not entitled to the injunction granted and the defendant is ready to pay reasonable damages so as to enable the plaintiff to increase the area of the *roshandans* to the extent of one square-foot each, as he is entitled to do under the compromise decree.

The plaintiff objects.

(1) to the dismissal of his suit in regard to the window;

(2) to the change in the order of the first Court as to the depth of the drain to be made in the defendant's roof to carry off the rain water.

Taking the objections first, it is clear that there is no force in the plea as to the window, there having been no invasion of privacy. In regard to the lower Court's order regarding the drain, that order is not intelligible nor do we see the necessity of any drain. Under his former undertaking the defendant was not entitled to

raise the roof and must maintain it at a level of six inches below the bottom level of the *roshandans*, otherwise an excessive rainfall might possibly result in water flowing through those *roshandans* into the plaintiff's room and the defendant cannot be allowed to obstruct the free flowing of the water from off his own roof in such a way as to cause or to make probably any damage to the plaintiff's house.

In regard to the appeal, we have examined the former compromise and we cannot agree that it was in the contemplation of the parties that the defendant should never at any time build on his roof at any point. The building of a second storey was not even in contemplation at that time. The defendant was building his first storey and the agreement was that the roof thereof was to be kept six inches below the *roshandans* so as to allow the water to flow off and that no *madgari* or ridge should be built adjoining the plaintiff's wall so as to obstruct the two *roshandans*.

There is nothing to show that the defendant was to be precluded from building, provided he did not obstruct the light and air going through these two openings.

Further, to say that a wall built at a distance of 10 feet from the plaintiff's wall is a complete obstruction of these openings is absurd.

We have to see whether in the circumstances of the present case the plaintiff is entitled to an injunction and if so, to what injunction—(a) in regard to the right as to air and light; (b) as to the flow of water.

At the commencement of the suit the plaintiff complained of a threatened disturbance only, but the defendant has since completed his constructions and it is now a case of actual disturbance or no disturbance at all.

Ordinarily the plaintiff in such cases, if he is entitled to relief, is entitled to an injunction rather than to damages. It is open to him, of course, to be content with damages, but S. 35 of the Easements Act shows that he is not entitled to an injunction except in such cases where he would be entitled to recover damages under Chap. IX of the Act.

Section 33 of the Act allows compensation to be recovered for the disturbance of an easement provided that the disturbance has actually caused substantial damage to the plaintiffs. The Explanation

to the section deals with the meaning of the words "substantial damage."

The Court below has not dealt with the question of substantial damage, but the first Court did and the evidence is on record, and we to shorten the proceedings deal with the issue here, as the evidence is on the record.

(a) We take first the question of light and air. We have already pointed out that the two *roshandans* are small slits which admit very small quantities of both light and air; that the plaintiff's room has been used in the past only as a store-room being really far too dark for any other purpose. The Munsif's two inspections show that the construction of the defendant's room on the roof does not materially interfere with the plaintiff's physical comfort or prevent him using his room as beneficially as he has done in the past. As the Munsif has put it, the disturbance is "*very slight*," so slight that he thought the trivial sum of Rs. 10 would be ample compensation. We have no hesitation in holding on the evidence that the disturbance, if any, at all is trivial and not material.

"*De minimus non curat lex*." The law does not concern itself with a disturbance which is trivial or immaterial.

In regard to the easement of light and air we hold that the plaintiff is not entitled to either damages or injunction.

(b) In regard to the flow of water, however, the case is different. The defendant has raised the portion of his roof between the plaintiff's wall and the western wall of the new room so that it is on a level with the lower edges of the *roshandans*. It is true that he has made a drain six inches deep next to the plaintiff's wall, but it is extremely doubtful if this will suffice to carry off easily the result of an extra heavy storm. He has acted contrary to the former compromise and there is danger of some damage to the plaintiff. In our opinion there has, in this respect, been material invasion of the plaintiff's right and the appropriate relief is to grant an injunction directing the defendant to lower this portion of his roof to a level six inches below the bottom level of the *roshandans* and to so arrange that rain water falling thereon shall flow away easily through proper and adequate channels.

We have dealt with all the points in the case. It is not a case for damages, as the plaintiff came into Court at once

when the disturbance was threatened and the defendant completed his structures pending the suit at his own peril.

The result is that we grant the plaintiff a mandatory injunction directing the lowering of the roof between his western wall of the new room and the plaintiff's eastern wall as laid down above.

The rest of the plaintiff's suit will stand dismissed. As he has failed in two-thirds of his suit and succeeded in one-third, the parties will receive and pay costs in all Courts in proportion to success and failure.

Decree modified.

A. I. R. 1915 Allahabad 154.

RICHARDS, C. J. AND TUDBALL, J.

Mt. Sahodra Bibi—Plaintiff-Appellant

v.

Bageshri Singh and another—Defendants-Respondents.

Second Appeal No. 821 of 1914, decided on 27th May, 1915, from the decree of the Sub-J., Jaunpur, dated 2nd March, 1914.

(a) *Pre-emption—Suit—Question of vendor's title cannot be raised—Pre-emptor must take the title which vendee was taking.*

A pre-emptor is not entitled in a pre-emption suit to put the vendor on proof of his title to the property which he purports to sell. The principle of pre-emption is substitution. A pre-emptor is bound to take the title which the vendee was ready to take. [P. 155, C. 1.]

(b) *Pre-emption—Suit must be with respect to entire property.*

A suit for pre-emption is not maintainable where the pre-emptor does not seek to pre-empt the entire property. [P. 155, C. 1.]

Haribans Sahai—for Appellant.

Lalit Mohan Banerji—for Respondents.

Judgment:—This appeal arises out of a suit for pre-emption. Portion of the property was situate in one *Mahal* and portion in another. The plaintiff claimed pre-emption of the whole of the property in Harballampur, but only portion of the property in Mirganj. He said that the vendor was only entitled to a much smaller share in Mirganj than that which he purported to sell. He added to his plaint a statement that if the Court found that the vendor was really entitled to all the property in Mirganj which he purported to sell, then he was willing to pre-empt that also. Both the Courts below

have dismissed the plaintiff's suit on the ground that he did not seek pre-emption of the entire property. In our opinion this decision was correct. A pre-emptor is not entitled in a pre-emption suit to put the vendor on proof of his title to the property which he purports to sell. The principle of pre-emption is substitution. A pre-emptor is, therefore, bound to take the title which the vendee was ready to take. He is not entitled to say to the vendor, "I will take all the property to which you prove you have a title, but I will not take property which you fail to prove belongs to yourself." We need hardly say that we do not decide that a vendor is entitled fraudulently to insert property, to which he has no title, in the sale-deed for the purpose of inflating the price or otherwise fraudulently to defeat pre-emption. In the present case it is perfectly clear from what took place in the Court below that the vendor has (or *bona fide* thinks he has) some title, not necessarily a perfect title, to the property which the plaintiff in the present suit claims belongs to his son. We dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 155 (1).

Full Bench.

RICHARDS, C. J., KNOX AND
BANERJI, JJ.

In the matter of Amba Prasad—Mukhtar of Moradabad.

Civil Misc. Appeal No. 98 of 1915, decided on 29th March, 1915, from the report of the Dist. J., Moradabad, dated 22nd January, 1915.

Legal Practitioners' Act (XVIII of 1879), S. 13 (b)—Pleader must not change sides—Duty to inform client when instructions offered by other side.

A professional gentleman should as far as possible stick to the side who first employed him. It might be a very good practice if when gentlemen were offered instructions by the opposite side in any connected case that they should at least in the first place inform their first clients. [P. 155, C. 2.]

Dillon and P. L. Banerji—for Mukhtar.
Ryves—for the Crown.

Judgment:—This matter is connected with a report against a certain Mukhtar. It is said that he has changed sides in the

course of different legal proceedings. In what is admitted to be the strongest case against him the charge is as follows:—

Certain persons were accused of an assault upon the servant of a *zemindar*. The Mukhtar appeared on behalf of one or more of the accused persons in the Appellate Court. Later on the *zemindars* brought proceedings under S. 145 of the Code of Criminal Procedure. The property the subject-matter of this application by the *zemindars*, is said to have been the same property a dispute about which led to the alleged assault. It is, therefore, said that the Mukhtar "changed sides" and was thereby guilty of unprofessional conduct. It must be borne in mind, in the first place, that when the Mukhtar first appeared it was merely to argue an appeal upon the evidence that was on the record. The question in dispute in the proceedings under S. 145 would be as to who was in possession of the property. It does not necessarily follow that the Mukhtar received any information from his first clients when he was appearing for them which could be used to their prejudice when he appeared for the *zemindars* in the proceedings under S. 145. There is nothing on the record to show that the Mukhtar's first clients offered to employ him in the second case or that they took any exception to his appearing in the case until the case was actually at hearing. Speaking generally, it is quite clear that a professional gentleman should as far as possible stick to the side who first employed him. It might be a very good practice if when gentlemen were offered instructions in any connected case that they should at least in the first place inform their first clients. In the present case it has not been proved to our satisfaction that the Mukhtar has been guilty of any professional misconduct.

The Rule is discharged.

Rule discharged.

A. I. R. 1915 Allahabad 155 (2).

PIGGOTT, J.

Rohilkhand and Kumaon Railway Co.—
Defendant-Appellant

v.

Ismail Khan—Plaintiff-Respondent.

Civil Revn. Petn. No. 167 of 1914, decided on 5th March, 1915, from an order of the Small Cause Court J., Bareilly, dated 21st July, 1914.

Railways Act (IX of 1890), S. 72—Risk note A is indemnity bond by sender, does not affect assignee's rights to receive goods as ordered—Railway must offer reasonable facilities for weighing—Railway liable for loss caused thereby.

Where the sender of goods through a Railway Company signs "risk note form A", he indemnifies the Company and makes it free from all responsibility for the condition into which the goods may be delivered to the consignee at destination and for any loss arising from the same. The consignee, however, is entitled to have the consignment weighed on the spot in the presence of some respectable servant of the Railway Company and it is the duty of the Railway servants responsible for the delivery of the goods to offer reasonable facilities for this operation. If the Railway servants do not allow the consignee to have the goods weighed at the time of delivery and thus let them remain lying in the Railway godown to the detriment of the consignee, the Company is liable in damages. [P. 157, C. 1.]

A risk note in form A is simply an indemnity bond by the sender for the benefit of the Company. It cannot in itself affect the rights of the consignee who is entitled to receive the consignment as ordered by him and to claim compensation in the event of the consignment suffering loss or damage. [P. 157, C. 2.]

B. E. O'Connor—for Appellant.

S. M. Suleman—for Respondent.

Facts:—A consignment of 11 tins of *ghu* was made over to the applicant Company at Tanakpur Railway Station for delivery to Ismail Khan at Bareilly. The sender was required to sign a risk note, as the goods were defectively packed and were liable to leakage and wastage. By this risk note, the sender covenants that he will hold the Railway Company free from all responsibility for the condition in which the goods may be delivered to the consignee. When the goods reached Bareilly, the consignee thought that five tins had suffered damage and he refused to take delivery except on certain conditions. After some time the Company sold the goods at auction. The plaintiff brought the present suit for damages, and it was decreed by the first Court. The defendant Company applied in revision to the High Court.

Judgment:—This is an application in revision on the part of the Rohilkhand and Kumaun Railway Company, against whom the opposite party, who was the plaintiff in the Court below, has obtained a decree for a sum of Rs. 311 from the Court of Small Causes at Bareilly. The case has been brought before this Court, because the defendant Company desires to obtain

an authoritative decision as to the respective rights and liabilities of the parties in respect of goods consigned under what is known as a "risk note, form A." The essential facts are simple. The plaintiff was the consignee of eleven tins containing *ghu* which were made over to the defendant Company at Tanakpur Railway Station for delivery to the plaintiff at Bareilly. When the consignment was tendered, it appeared to the Railway Company that the goods were so defectively packed as to be liable to damage, leakage or wastage in transit. Accordingly the sender was required to sign the risk note above referred to. This document is in effect an indemnity bond, whereby the sender covenants that he will hold the Railway Company harmless and free from all responsibility for the condition in which the aforesaid goods may be delivered to the consignee at destination, and for any loss arising from the same. When the consignment reached Bareilly, the consignee was of opinion that the five out of the eleven tins had suffered damage in transit. He refused to take delivery except on certain conditions. A lengthy correspondence followed, and finally the defendant Company sold the *ghu* at auction. The *ghu* had clearly deteriorated in value and the price realised was a small one. The Court below has held that the plaintiff was entitled to compensation, which has been assessed at the sum already stated. With regard to the position of the parties at the moment the consignee inspected the goods at Bareilly Station and the proper course for the consignee, to have followed under the circumstances it seems to me that the principles involved are fairly obvious and have been very correctly laid down by this Court in the case of *Jwala Pershad v. Great Indian Peninsular Railway* (1), and in another case which is printed as a foot-note* to the report above-mentioned. The consignee was entitled to have the goods weighed then and there before he surrendered the railway receipt. When this had been done, he was entitled to endorse on the back of the railway receipt a statement that he accepted delivery of the consignment as it stood, while taking note of the fact that its actual weight was only so much and not the full weight as given in the railway receipt itself. He would probably also

(1) 21 I. C. 428=11 A. L. J. 775 Note—*Ed.*

*See *Koka Mal v. G. I. P. Railway*.

have been entitled to add to his endorsement any remarks which he might think proper to make for his own protection regarding the appearance of the consignment at the moment of his accepting delivery. The Station Master or other local officials of the Railway Company at the delivery Station were bound to offer to the consignee reasonable facilities for weighing the goods on the spot, and would, in my opinion, be going beyond their legal rights if they insisted on the surrender of the railway receipt, with a mere endorsement to the effect that the goods therein specified had been duly received, before allowing the consignee access to the goods for the purpose of verifying the weight. It being obvious, on the other hand, that the Railway Company were bound in self-protection, and would be perfectly entitled, to maintain effective custody of the goods through their servants and agents until the railway receipt was delivered up to them, the practical result is that the plaintiff's rights were to have this consignment weighed on the spot in the presence of some respectable servant of the Railway Company and that it was the duty of the Railway servants responsible for the delivery of the goods to offer reasonable facilities for this operation. Now it is quite certain that the consignee in this particular case was not allowed to do what I have above suggested. The case for the defendant Company is that the only reason why he was not allowed to do so was that he did not content himself with asking merely for this, but he required the Station Master or some other officials of the Company to certify by his signature, either on the endorsement proposed to be made on the railway receipt, or on some other document, that the consignment in question was in fact being delivered short weight and perhaps also in a damaged condition. This is really a simple issue of fact, and the utmost that could be said in support of this application for revision would be that the position has not been fully appreciated in the Court below and the mind of that Court not directed with sufficient clearness to the investigation of the precise question of fact on which the rights or liabilities of the parties should have been made to depend. I think there is a certain amount of force in this argument; but I am not disposed to allow it to prevail. For one thing I am of opinion that, if there was any misapprehension of the essential issues of the case in the Court below, that

was largely due to the attitude taken up by the defendant Company in their pleadings before that Court, a point as to which I have a few words to add presently. I am further of opinion that, from any possible point of view, the Company in this particular instance must be held to have made themselves liable to the payment of some damages at any rate to the plaintiff by reason of the delay which took place before the claim of the plaintiff consignee to take delivery, either of a portion only of the consignment or of the entire consignment subject to conditions, was either accepted or definitely rejected on behalf of the Company. It seems to me that those responsible for the action taken on behalf of the defendant Company in this matter were not only under some misapprehension as to the extent of their legal rights, but were at the same time using their advantageous position, as being the party in possession of goods of a peculiarly perishable nature, in order to put pressure on the consignee to accept delivery on their own terms. The Company was in no hurry, being under the impression that any loss which might result from the deterioration of the *ghu* lying in their godown would inevitably be borne by the consignee. There was always the possibility in their favour that the latter might become nervous as to the extent of this loss and the soundness of his legal position, and might close the transaction by accepting delivery on a railway receipt endorsed with a mere acceptance of the goods as despatched. From the arguments that have been addressed to me in support of this application, I think there is some misapprehension on the side of the Railway Company with regard to the legal effect of a risk note in "form A." That document is simply an indemnity bond by the sender for the benefit of the Company. It cannot in itself affect the rights of the consignee. The latter is obviously entitled to receive the consignment as ordered by him and to claim compensation in the event of the consignment suffering loss or damage. The question whether, in this particular case, if delivery had been made on the railway receipt endorsed as already suggested, the consignee would have been entitled to claim damages in the first instance from the Railway Company, leaving the Company to enforce their legal remedy against the sender under the risk note, is one which does not arise on the facts as they stand. As a matter of fact I have a

little doubt that any consignee, claiming damages under the circumstances suggested, would, in his own interests, have impleaded both the Railway Company and the sender and would ordinarily, at any rate, have obtained a decree against the sender alone, the latter having accepted all responsibility for the condition of the consignment when placed in the hands of the Railway Company. As the case stands, I am clearly of opinion that the defendant Company have made themselves liable in damages to the plaintiff by their conduct, when delivery was asked for by the latter. Even supposing that there was some misunderstanding between the parties at Bareilly, and that neither the plaintiff consignee nor the local officials of the Railway Company in charge of the consignment clearly appreciated their respective rights and liabilities, I think the defendant Company should definitely have offered the plaintiff facilities for weighing the consignment on the spot before requiring him to part with the railway receipt. I hold them liable in damages partly for this reason, partly for their long delay in returning a definite answer to the plaintiff's claim and partly for having sold the consignment at auction under circumstances which did not warrant the adoption of that course. The application before me raises no serious question as to the amount of the damages awarded and consequently I do not discuss this point. The result is that the application fails and I dismiss it with costs.

Application dismissed.

A. I. R. 1915 Allahabad 158.

CHAMIER AND PIGGOTT, JJ.

Duni Chand—Applicant-Appellant

v.

Arja Nand and another—Opposite Party-Respondents.

First Appeal No. 114 of 1914, decided on 16th February, 1915, from an order of the Addl. Dist. J., Saharanpur, dated 19th May, 1914.

Civil P. C. (V of 1898), O. 22, R. 5—Order rejecting application under O. 22, R. 5, is not appealable.

An order dismissing an application to be brought on record as the representative of a deceased appellant is not a decree and no appeal lies from such an order. [P. 158, C. 2.]

Nihal Chand—for Appellant.

Parmeshwar Dayal—for Respondents.

Facts:—One Jaigopal executed a Will in favour of his daughter's son, Arja Nand, in 1907. On Jaigopal's death Arja Nand got possession of the property. Nihal Chand brother of Jaigopal brought a suit against Arja Nand for possession and declaration that the Will executed by Jaigopal was null and void, as Jaigopal lived jointly with him. The Munsif dismissed the suit. Nihal Chand preferred an appeal to the District Judge. During the pendency of the appeal Nihal Chand died leaving behind *Mt. Dakho Kuar* as his widow. Duni Chand, who was the son of the brother-in-law of Nihal Chand made an application to the appellate Court to be brought on the record in place of Nihal Chand, deceased, claiming to be his adopted son. The application was opposed by Arja Nand, respondent to the appeal. The Additional District Judge, after going through the evidence produced by the parties on the question whether Duni Chand was or was not the legal representative of Nihal Chand, deceased, rejected the application. Duni Chand appealed to the High Court.

Judgment :—This is an appeal against an order of the Additional Judge of Saharanpur, dismissing the appellant's application to be made plaintiff in the place of Nihal Singh deceased, the original plaintiff. The defendants-respondents contend that that no appeal lies. In our opinion the contention is well founded. It is not suggested that the order amounts to a decree as defined in the Code. As an order it is certainly not appealable, for it was not passed under either R. 9 or R. 10 of O. XXII. We were asked to treat the appeal as an application for revision. We are not prepared to do this. The Court below does not appear to have acted without jurisdiction or irregularity in the exercise of its jurisdiction. Moreover Nihal Singh left a widow who appears to be his legal representative, if the appellant is not the adopted son, and who may yet succeed in getting herself made plaintiff in place of her deceased husband. It may also be possible to appeal against the order of the Court when passed, dismissing the suit as having abated. There are two reported decisions of this Court that no such appeal lies, but the Bombay and Madras High Courts

have held that such an order is tantamount to a decree and is appealable as such.

The present appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 159.

RICHARDS, C. J. AND BANERJI, J.

Collector of Meerut—Defendant-Appellant

v.

Umrao Singh—Plaintiff-Respondent.

First Appeal No. 380 of 1913, decided on 23rd March, 1915, from a decree of the Sub-J., Moradabad.

(a) *Civil P. C., (V of 1908), O. 32, Rr. 3 and 4—Mother borrowed debt on mortgages for recovering minor's property—Suit on mortgages—Mother not improper guardian ad litem.*

The father of the plaintiff was murdered leaving his widow and the plaintiff, a minor, him surviving. The motive of the murder was to take possession of property which belonged to the plaintiff's father. Suits had to be brought in the name of the minor. The mother of the minor borrowed on mortgages on behalf of the plaintiff as his guardian for the expenses of the suit. Suits were thereafter brought on these mortgages and decrees were obtained. The plaintiff sued to set aside these decrees:

Held, that the mother was a fit and proper person to be his guardian *ad litem* in the proceedings in the Civil Court and that if the decrees were fairly and properly obtained against the minor as represented by his mother, the decrees were binding and the Court could not go behind them. [P. 159, C. 2.]

(b) *Decrees—Setting aside—Mother guardian did not defend suit as no ground for setting aside.*

Held, further, that the mere fact that the mother did not defend the suits on the mortgages would not make the decrees invalid.

[P. 160, C. 1.]

A. E. Ryves—for Appellant.

D. C. Banerji—for Respondent.

Judgment:—This appeal arises out of a suit brought by the plaintiff, Umrao Singh, for a declaration that certain decrees which had been obtained against his mother as his guardian were not binding upon him. The suit was instituted in April, 1912. The estate of the defendants was taken over by the Court of Wards in February, 1913. The Court below made a decree in part in the plaintiff's favour on the 13th of May, 1913. The Collector was never made a party to this suit and it is doubtful perhaps whether the decree was quite regular. It is, however, unneces-

sary to consider this point, having regard to the position which Mr. Ryves has taken up in the present appeal on behalf of the Court of Wards. When the Collector came to know of the decree of the Court below, he filed the present appeal against the decree. Mr. Ryves has stated at the outset that he waives any irregularity and that he is willing to argue the case on the merits, just as he would have done had the Collector been made a party and the decree had been regularly made against him. It appears clearly from the evidence and admitted facts that the father of the plaintiff, one Bahal Singh, was murdered leaving his widow and the plaintiff him surviving. One Parsa helped the widow against her adversaries. The supposed motive of the murder was to take possession of property which belonged to Bahal Singh. After the murder of Bahal Singh a suit had to be brought in the name of his minor son, which was fought right up to the High Court. The costs, which were allowed under the decree of the High Court, amounted to Rs. 793. It is clear that this does not at all represent the actual money that had to be expended in the course of that litigation alone. Besides this, however, there were mutation proceedings in the Revenue Court which were, apparently, contested. There was also a riot case in which undoubtedly money was expended. We have no doubt that money was also expended in connection with the prosecution of the murderer of Bahal Singh. It is in connection with these expenses that the money was borrowed on mortgages executed by the mother on behalf of the plaintiff as his guardian. Suits were brought on foot of these mortgages and decrees were obtained in 1909 and 1910. It is to set aside these decrees that the present suit is brought.

There are two aspects of the case. *First* as to whether the decrees obtained against the plaintiff with the widow as his guardian do not bind him. The widow was his natural and *de facto* guardian. *Prima facie* she was a fit and proper person to be his guardian *ad litem* in the proceedings in the Civil Court. She had no interest adverse to him. So far as the evidence goes, she had been most active in taking steps to protect the minor's property. If the decrees were fairly and properly obtained against the minor, as represented by his mother, then the decrees are binding and the Court ought not to go behind them. The only suggestion of the decrees being

improper is that the widow did not defend the suits. The total amount borrowed was a sum of Rs. 2,100. The expenditure upon the matters to which we have already referred must have been very considerable. It is possible that if the widow had defended the suits brought on foot of the mortgages and put the plaintiff to strict proof of legal necessity for each and every item, she might, possibly, have succeeded in having some small item struck out. Defending the suits would probably have cost much more than the item disallowed. In our opinion it is impossible to hold, under the circumstances of the present case, that the decrees, even though *ex parte*, were in any way improperly obtained. If this be so, it is quite unnecessary to go into the other matters and to consider whether the defendants have been able to show that there was legal necessity for every part of the consideration for the bonds. In our opinion the decree of the Court below was erroneous and must be set aside.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

A. I. R. 1915 Allahabad 160 (1).

CHAMIER, J.

Mt. Fakhran—Applicant

v.

Rajab Ali Khan and others—Opposite Parties.

Civil Revn. Petn. No. 170 of 1914, decided on 26th February, 1915, from an order of the Dist. J., Shahjahanpur, dated 4th May, 1914.

Civil P. C., (V of 1908), O 21, R 89—Attaching creditor has no "interest in property" for purpose of O. 21, R. 89.

A decree-holder who attaches a property before it is put to sale at auction, is not entitled to get the sale set aside under O. XXI, R. 89, of the Code of Civil Procedure. [P. 160, C. 2.]

Lakshmi Narayan—for Applicant.

Hameedullah—for Opposite Parties.

Facts:—The petitioner as attaching creditor put in an application under O. XXI, R. 89, Civil Procedure Code, for setting aside a sale. The Courts below held that she had no right to apply.

The petitioner applied to the High Court in revision.

Judgment:—I doubt whether this application for revision is maintainable at all; but assuming that it is maintainable I think it should be dismissed on the merits. Certain property was sold in execution of a decree. The applicant had attached the property before the sale took place and after the sale she made an application under O. XXI, R. 89, to have the sale set aside. The Courts below have held that she is not a person who is entitled to ask the Court to set aside the sale. It is admitted that she does not own the property. The only question is whether she has any interest in it by virtue of any title acquired before the sale within the meaning of O. XXI, R. 89. A person who has attached property may for some purposes be regarded as having an interest in it, for example, it has been held that an attaching creditor is entitled to redeem mortgaged property. But what is required to entitle the present applicant to ask the Court to set aside a sale under R. 89 is an interest in the property by virtue of a title acquired before the sale. The applicant has acquired no title whatever to the property. I, therefore, hold that she is not a person who has an interest in the property by virtue of a title acquired before the sale within the meaning of R. 89 and, therefore, she is not entitled to ask the Court to set the sale aside. The application is dismissed with costs.

Application dismissed.

A. I. R. 1915 Allahabad 160 (2).

RICHARDS, C. J. AND TUDBALL, J.

Munna Lal—Defendant-Appellant

v.

Ram Gulam Singh and others—Plaintiffs-Respondents.

First Appeal No. 140 of 1914, decided on 19th May, 1915, from an order of the Dist. J., Budaun, dated 31st August, 1914.

Pre-emption—Co-sharer in possession by sale-deed unchallenged for 3 years is recorded co-sharer for pre-emption suit.

Where a person has been a recorded co-sharer in possession of a property by virtue of a sale-deed and no steps have been taken for three years to set aside the sale, or to oust him from possession, he must be regarded as a co-sharer for the purposes of a pre-emption suit.

[P. 161, C. 2.]

Sital Prasad Ghose—for Appellant.

S. D. Sinha—for Respondents.

Judgment:—The facts connected with this appeal so far as they are material to our decision are as follows. The plaintiff is a recorded co-sharer and in possession of certain property in the *mahal*. He has been recorded for three years. It is conceded that if he is a "co-sharer", he is entitled to bring the present suit for pre-emption as against a stranger. The defendant-vendee, however, contends that the plaintiff is not a co-sharer, because his vendor had no title to sell to him; on the contrary that the real owner of the share (which the plaintiff's vendor purported to sell) sold the share to him. The lower Appellate Court has held that the plaintiff being a recorded co-sharer in possession of the property and no step having been taken to set aside the sale, or to oust him from possession, he must be regarded as a co-sharer. In our opinion this view is quite correct.

It is next argued that the Court of first instance having found that the property, in respect of which the plaintiff is recorded, could not be sold by the plaintiff's vendor, and that this share has vested in the defendant in the present suit, and the finding not having been set aside by the lower Appellate Court, the suit should not have been remanded. It is quite impossible that two persons could be the owners of the same share at the same time. In our opinion, the Court below must be taken to have set aside the finding of the Court of first instance.

Under these circumstances the appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 161.

PIGGOTT, J.

Shankar Singh—Plaintiff-Applicant

v.

Mst. Rekha and another—Defendants-Respondents.

Civil Revn. Petn. No. 146 of 1914, decided on 5th March, 1915, from an order of the Small Cause Court J., Bareilly.

(a) *Limitation Act (IX of 1908), Art. 57—Return of advance for purchase of goods becomes due after period fixed by usage or reasonable time fixed for delivery of goods.*

In a suit for the balance of money advanced in payment of goods to be delivered where no time is fixed for delivery, the Court ought to

consider whether, by reason of trade custom or some established usage well understood by both parties, any particular period can be laid down as the time when the goods required in the particular case ought to have been delivered, failing this, it should fix some reasonable time after the advance of the money, having regard to all the circumstances of the case. (7 W. R. 164, *Rs.*). [P. 161, C. 1 & P. 161, C. 2.]

(b) *Provincial Small Cause Court Act (IX of 1887), S. 25—High Court can interfere if suit dismissed as time barred presuming date of payment as date of delivery of goods.*

If a Court without making such inquiry as to the time of delivery of goods dismisses the suit as barred by time holding that the date of payment must be taken to be the date of delivery of the goods, the High Court would interfere in revision under S. 25 of the Small Cause Courts Act. [P. 162, C. 2.]

Iqbal Ahmad—for Appellant.

Sham Nath Mushram for *Tej Bahadur Sapru*—for Respondents.

Judgment :—This is an application in revision by a plaintiff whose suit for the recovery of certain money has been dismissed by the Judge of the Court of Small Causes at Bareilly. The suit was on the face of it one for the balance of money advanced in payment of goods to be delivered, falling under Art. 57 of the first Schedule to the Indian Limitation Act IX of 1908. The learned Judge of the Court below rightly appreciated this point, but went on to hold that in as much as there was nothing in the plaint to show that any date was fixed for delivery of the goods, the date of payment must be taken to be the date for delivery of goods. The learned Judge was, in my opinion, palpably wrong. The circumstances of the transaction were such, according to the allegation in the plaint, that the date of the payment of the money could not possibly be the date for the delivery of the goods. The principles which should govern the decision of the Court when a question of this sort arises appear to have been correctly laid down in a very old ruling, that of *Boddonath Shah v. Lal-un-nissa Bibi* (1). The learned Judge of the Court below ought either to have considered whether, by reason of trade custom or some established usage, well-understood by both parties, any particular period could be laid down as the time when the goods required in this particular case ought to have been delivered, or failing this, he should have fixed some reasonable time after the advance of the money, having regard to all

(1) (1867) 7 W. R. 164.

the circumstances of the case. I note that, according to the findings of the Court below, an allowance of only thirty days for the delivery of the goods would be sufficient to bring this claim within limitation. In my opinion the suit has been thrown out in the Court below without adequate inquiry and on a misapprehension of the law applicable to the case. It has been contended on behalf of the defendants-opposite party that a wrong decision upon a question of limitation would not of itself justify interference of this Court under S. 25 of Act IX of 1887 (the Provincial Small Cause Courts Act.) It is not easy to lay down precise principles to govern the exercise of the very wide discretion which has, for obvious and necessary reasons, been conferred upon the High Court by the section above referred to. In the present case, however, I think it is apparent on the face of the judgment of the Court below that that Court would have done better to inquire into the facts of the case and to determine the case as a whole, including the question of limitation, when fully satisfied as to the facts. The application before me has been admitted by a learned Judge of this Court, and I am not prepared to say that the case is one in which in the exercise of its discretion it would be unreasonable for this Court to interfere in the interests of justice. I set aside the order and decree of the Court below and remand the case to that Court with orders to re-admit the same to its file of pending suits and to dispose of it with due regard to the remarks made above on the question of law involved. Costs of this application will be costs in the suit.

Application allowed.

A. I. R. 1915 Allahabad 162.

BANERJI, J.

Jai Debi Kuar—Applicant

v.

Emperor—Opposite Party.

Criminal Revn. No. 146 of 1915, decided on 21st April, 1915, from an order of the S. J., Moradabad.

Penal Code (XLV of 1860), S. 500—Repetition of defamatory statement in enquiry constitutes separate publication.

The accused made certain defamatory statements against a Government Official in her petition to the Lieutenant Governor, and on inquiry

she repeated the same statements before two Magistrates on different occasions :

Held, that the statements made before the two Magistrates were the publication of the original defamatory statements made in the memorial to the Lieutenant-Governor and the accused was guilty of three separate publications of the libel.

[P. 162, C. 2 ; P. 163, C. 1.]

S. C. Mukerji—for Applicant.

Asst. Govt. Advocate—for the Crown.

Judgment :—This is an application for the revision of the order of the learned Sessions Judge of Moradabad, affirming the conviction of the applicant for an offence under S. 500 of the Indian Penal Code. It appears that the applicant, *Mt. Jai Debi*, presented an application to His Honour the Lieutenant-Governor in which she charged the complainant, Mr. Krishna Chandra Joshi, Deputy Collector, with instigating her opponent, Kiliyan Rai, to bring false charges against her. An inquiry was ordered and Mr. Nanavati, the Collector of Budaun, sent for the applicant and she appeared before him and repeated what she had said in her memorial, and added that Mr. Krishna Chandra Joshi had asked for a bribe from her which she had refused to pay. A further inquiry was held by Mr. Ingram, the successor of Mr. Nanavati, and before him also she apparently repeated what she had stated in her memorial to His Honour the Lieutenant-Governor. It was in regard to these statements that she was prosecuted, and she has been convicted on three separate charges, namely (1) of the statement made in the memorial to His Honour the Lieutenant-Governor, (2) the statement made before Mr. Nanavati and (3) the statement made before Mr. Ingram.

It is urged that she could not be convicted on three different charges, because the statements made before Mr. Nanavati and Mr. Ingram cannot be deemed to be a publication of the libel inasmuch as she made the statements in answer to question put to her. I am unable to agree with this contention. There was no obligation on the applicant to make any statement to Mr. Nanavati imputing dishonesty and bribery to Mr. Krishna Chandra Joshi, and there was equally no obligation on her to make defamatory statements in regard to that officer before Mr. Ingram. The statements made by her were clearly publications of the original defamatory statement made in the memorial to the Lieutenant-Governor

and there were thus three separate publications of the libel. The case does not fall within any of the exceptions to S. 499 of the Indian Penal Code. As the learned Sessions Judge has pointed out, exception (2) has no application as there was no expression of opinion. As to exception (8), there was nothing to show that she acted in good faith. The applicant was, therefore, rightly convicted on three different charges, and I see no reason to interfere with the decision of the Court below.

I accordingly dismiss the application.

Application dismissed.

A. I. R. 1915 Allahabad 163.

CHAMIER, AND PIGGOTT, JJ.

Jawahir—Plaintiff-Appellant

v.

Neki Ram—Defendant-Respondent.

Second Appeal No. 179 of 1914, decided on 14th December, 1914, from a decree of the Dist. J., Agra.

(a) *Decree—Setting aside—Jurisdiction—Decree obtained by committing fraud—Suit to set aside also lies in Court where fraud committed or decree passed—Civil P. C., (V of 1908), S. 20.*

The plaintiff sued the defendant in Agra praying that a decree for money obtained against him by the defendant in Siliguri within the jurisdiction of the Calcutta High Court be set aside, on the ground that the defendant fraudulently prevented the institution of the suit from becoming known to him by causing the notice of suit to be served on some other person in Agra and an incorrect return to be made to the Court:

Held, that as part of the fraud was committed in Agra the cause of action arose in part at least in Agra and that, therefore, the Courts in Agra had jurisdiction to entertain the suit.

[P. 164, C. 2 & P. 165, C. 1.]

Semble:—A suit to set aside a decree on the ground of fraud may be brought in a Court other than that by which the impugned decree was passed, if the property of the plaintiff situated in that Court is attached in that decree.

(b) *Civil P. C., (V of 1908), S. 20—Seeking execution of the decree affords plaintiff cause of action.*

In a suit to set aside decree obtained by fraud the execution of the decree and the application for the realization of the amount of it are acts of the defendant which infringe the rights of the plaintiff and afford him his principal cause of action.

[P. 164, C. 2.]

(c) *Decree—Setting aside—Fraud—Non-service of summons does not prove fraud.*

A plaintiff in such a case cannot succeed merely on proving that the summons was not served on him.

[P. 163, C. 2.]

Narmadeshwar Prasad for Surendra Nath Sen—for Appellant.

Gulzari Lal—for Respondent.

Judgment:—This was a suit by the appellant praying that a decree for money obtained against him by the respondent in Siliguri might be set aside on the ground that it had been obtained by fraud, and that an injunction might be issued restraining the respondent from executing the same. The appellant alleged that the claim on which the decree rested was totally without foundation, that the respondent had taken steps to prevent the institution of the suit from becoming known to him, and that he knew nothing of it till October 8th, 1911, when the respondent caused some of his property to be attached within the jurisdiction of the Munsif of Fatehabad in the Agra district. The appellant alleged that a cause of action accrued to him on October 11th at the place where the attachment was effected. The Munsif decreed the claim, but on appeal the District Judge held that the suit was not maintainable at all. He seems to have thought that the whole of the appellant's case was that the summons in the suit had not been served on him, and he declined to consider whether there was any foundation for the respondent's suit. The learned Judge has, we think, misunderstood the case. A plaintiff in a case of this kind cannot succeed merely on proving that the summons was not served on him, but if he proves that the former suit had no foundation in fact but was the outcome of previous enmity, that the summons was not served on him, and that the person who is said to have been present at the service was not there at all, and if he proves other facts also which tend to show that the defendant was anxious to avoid a fair trial of the issue between the parties, it is certainly open to the Court to find that the decree was obtained by fraud. The Munsif found that the appellant had proved all this, and he held that the decree had been obtained by fraud. It seems to us that in a case of this kind the Court can and must go into the whole matter before it can decide the case with any satisfaction to itself or any one else. That was the view taken in *Lakshmi Charon Shaha v. Nur Ali* (1), and it is supported by ample authority. As was said

by Lord Robertson in *Khagendra Nath Mahata v. Pran Nath Roy* (2), which was a suit of this kind, "the appellant's allegation is an attack, not on the sufficiency of the service of notice but on the whole suit as a fraud from beginning to end." So far as the merits of the case are concerned, we have no hesitation in saying that the proceedings in the lower Appellate Court were not satisfactory.

It is, however, contended on the authority of the decision in *Day Dial v. Munna Lal* (3), that such a suit as this does not lie at all, except possibly in the Court or district in which the decree impugned was passed.

That such a suit will lie is beyond doubt. See the remarks of Jenkins, C. J., in *Nanda Kumar v. Ram Jiban* (4) and the decisions of the Privy Council in *Radha Raman Shaha v. Pran Nath Roy* (5), [affirming the decision of the High Court reported in *Pran Nath Roy v. Mohesh Chandra Moitra* (6), and *Khagendra Nath Mahota v. Pran Nath Roy* (2)]. Other recent instances of such suits are *Thakur Prasad alias Shambhoo Narain v. Punkal Singh* (7) and *Abdul Haque v. Abdul Hafiez* (8). Incidentally these cases show also that a suit to set aside a decree on the ground of fraud may be brought in a Court other than that by which the impugned decree was passed, and we may observe that if it were otherwise no suit could be brought to set aside a decree obtained by fraud in a Court of Small Causes, however gross the fraud might be.

But in this Court there seems to be a conflict of opinion on the question whether a suit will lie in these Provinces against a resident of another Province to have a decree obtained by him in that Province set aside on the ground of fraud, even when property of the plaintiff in these Provinces has been attached in execution of the decree impugned. In *Banke Behari Lal v. Pokhe Ram* (9), it was held that a suit would lie in Cawnpore against a resident of Calcutta to have a decree obtained by him in the Calcutta High Court set

aside on the ground of fraud, when property of the plaintiff in Cawnpore had been attached in execution of the decree impugned. But in *Kalyan Das v. Bakhshi Ram* (10) Knox and Griffin, J.J., held that a suit to set aside, on the ground of fraud, a decree obtained in Cachar by a resident of that place would not lie in Agra, even though the plaintiff had been arrested in Agra in execution of that decree; and in *Dau Dial v. Munna Lal* (3), Richards, C. J. and Tudball, J., held that a suit did not lie in Mainpuri against a resident of Calcutta to set aside, on the ground of fraud, a decree obtained by him in Calcutta in execution of which the plaintiff's property in Mainpuri had been attached. In the course of the principal judgment it is said that, "all that the plaintiff complains of happened in Calcutta and, therefore, the cause of action arose in Calcutta and no place else." As at present advised we are not prepared to take this view. In the plaint in that case the plaintiff complained specifically of the attachment of his property in the Mainpuri district, and he prayed for an injunction directing the defendant to release the property from attachment. It seems to us that the attachment of the property was an important part of his cause of action and that it gave the plaintiff the right to sue in Mainpuri. We agree with the observation made in the case of *Banke Behari Lal v. Pokhe Ram* (9) by Banerji, J., that "the execution of the decree and the application for the realization of the amount of it are acts of the defendant which infringe the rights of the plaintiff, and afford him his principal cause of action."

In view of the conflict between the decisions in *Dau Dial v. Munna Lal* (3) and *Kalyan Das v. Bakhshi Ram* (10) on the one hand and in *Banke Behari Lal v. Pokhe Ram* (9) on the other, we have considered the propriety of referring this case to a larger Bench, but we have come to the conclusion that such a course is unnecessary. It is part of the plaintiff's case that the defendant fraudulently prevented the institution of the suit from becoming known to him by causing the notice of suit to be served on some other person and an incorrect return to be made to the Court. This is part and parcel of the fraud alleged, and if the allegation is found to be true part of the fraud was committed in the Agra district, and there can be no

(2) (1902) 29 Cal. 395=29 I. A. 99=6 C.W.N. 473 (P.C.).

(3) A. I. R. 1914 All. 93=36 All. 564=24 I. C. 978.

(4) (1914) 23 I. C. 337=41 Cal. 990.

(5) (1901) 28 Cal. 475=5 C. W. N. 757.

(6) (1897) 24 Cal. 546.

(7) (1908) 8 C. L. J. 485.

(8) (1910) 5 I. C. 648.

(9) (1902) 25 All. 48=1902 A. W. N. 179.

(10) F. A. No. 14 of 1910.

doubt that the cause of action arose in part at least in the Agra district, even if the attachment of the plaintiff's property is not part of the cause of action.

We, therefore, direct that the record be returned to the lower Appellate Court in order that a finding may be recorded upon the second issue. Further evidence will not be admitted except for good cause shown. On return of the finding 10 days will be allowed for objections.

Case remanded.

A. I. R. 1915 Allahabad 165.

KNOX, J.

Ram Harakh Pathak and others—Defendants-Appellants

v.

Ram Saran Pathak and others—Plaintiffs-Respondents.

Second Appeal No. 686 of 1914, decided on 20th May, 1915, from the decision of the Addl. Sub-J., Gorakhpur, dated 27th February, 1914.

Jurisdiction—Consent of parties cannot give jurisdiction to appellate Court to hear appeal when barred—Civil P. C., (V of 1908), Sch. II, Cl. 16.

A decree passed in the terms of an award not being appealable, the parties to the decree cannot, by giving consent to an appeal being heard and the case being decided again on the merits, give the appellate Court jurisdiction to entertain an appeal against such decree.

[P. 166, C. 1.]

Janq Bahadur Lal—for Appellants.

Brij Nath Vyas—for Respondents.

Judgment :—The plaintiffs, now respondents, sued on a bond. The defendants pleaded payment. The matter in dispute was referred to arbitration; the arbitrator decided in favour of the plaintiffs. Objections were taken by both parties. The lower Court, after considering the objections, dismissed them and drew up a decree in terms of the award. From that decree an appeal was filed to the Court of the Additional Judge. The Additional Judge accepted the appeal and on the 16th of August, 1912, entertained an application signed by one of the plaintiffs and the Vakil engaged for both plaintiffs on the one side, and by the defendant Ram Harakh and a Pleader who appeared for both defendants on the other. The application was to the effect that both parties agreed that the appeal

should be accepted (*manzur*) and that the case should be decided on the merits. The Additional Judge ordered that the appeal be accepted and the case be decided on the merits. Some evidence was taken and the case remained on in the Court of the Additional Judge until the 4th of April, 1913. Then, so far as the record shows, the case went automatically to the Court of the Subordinate Judge of Basti. No doubt there must have been some order, but whether that was an order passed by the District Judge or by the Additional Judge does not appear. There remains the fact that on the 5th of April the case appeared in the Court of the Subordinate Judge of Basti and he began to exercise jurisdiction upon it. It remained in that Court until the 21st of January, 1914, when we are told that by an order of the District Judge of Gorakhpur the case was made over to the Court of the Additional Subordinate Judge of Gorakhpur; that officer held that no appeal lay under the circumstances to the Court of the Additional Judge, that the admission or agreement of parties was on a point of law and was to the effect that a certain Court should re-try the case, that this agreement was not binding on the plaintiffs, and that it did not give that Court or the present Court any jurisdiction to hear the appeal. He accordingly dismissed the appeal.

It is obvious that the record is incomplete, that there are papers which ought to be on the record, which are not there now, and the absence of these papers has caused the waste of a whole day of time by this Court. I expect the learned District Judge to look into the matter and see to whom it is owing that this record has been drawn up in such an incomplete way.

The defendants have come here in appeal and have submitted a memorandum of appeal consisting of seven pleas. The *first* is to the effect that the learned Additional Judge had no jurisdiction to set aside the order of his predecessor dated the 16th of August, 1912. I do not know, nor can I ascertain from the record, who the predecessor of the learned Additional Judge was. So far as the record shows Mr. Rose was the only Additional Judge who dealt with this case. The *second* plea is to the effect that the agreement of the parties dated the 16th of August, 1912, was binding on both the plaintiffs and the defendants and the plaintiffs have no right to

resile from the same. There is no doubt that the procedure adopted by the learned Additional Judge in passing that order of the 16th August, 1912, was very erratic. The order in question was a decree based upon an award. From that decree no appeal lay to the Additional Judge and he had not the least power to adopt the procedure which he afterwards did. The 3rd and 4th pleas are practically to the same effect. The 5th plea is to the effect that the plaintiffs were estopped from questioning the jurisdiction of the Court to hear the appeal on the merits. This follows my decision on the preceding plea. Then there is a plea to the effect that even if the appellants' Vakil made any admission on a point of law, it is not binding on the appellants. The last plea is that the Additional District Judge being seized of the case, the order of transfer to the Court of the Additional Subordinate Judge was bad in law. I cannot find the order of transfer on the record and it is impossible to say what that order was. In the absence of the order it must be presumed to have been rightly made until the contrary is shown. A great deal of argument was addressed to me and several cases cited as to the power of the District Judge to withdraw an appeal from a Subordinate Court when that Court has gone to some length in the case. I quite agree with the contention that it is most inexpedient for orders of this nature to be passed, but I cannot say that such orders are illegal, specially when I am not satisfied as to the circumstances under which the order was passed.

The result then is that we are carried back to the appeal which was filed in the Court of the Additional District Judge, no appeal lay and everything that followed must be swept aside as without jurisdiction and I come back, though not quite by the same road, to the decree of 30th of May, 1912.

I dismiss this appeal with costs, including fees in this Court on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 166.

KNOX, J.

Jamna Kunwar—Defendant-Appellant

v.

Ramhit Singh and another—Plaintiffs-Respondents.

Second Appeal No. 962 of 1913, decided on 18th February, 1915, from the decision of the Dist. J., Jaunpur, dated 23rd April, 1913.

Hindu Law—Gift by widow with consent of next reversioner is binding.

Where a Hindu widow executed a deed of gift in respect of her husband's property with the consent of her deceased husband's mother, in favour of those persons who were reversioners next to the mother at the date of the gift :

Held, that the gift was binding upon the mother. [P. 168, C. 1.]

L. M. Banerji—for the Appellant.

Judgment:—The property in dispute in this appeal is property at one time belonging to Bhagwan Singh. To this property some nine years ago *Mt. Anari Kunwar*, his widow, succeeded and came into possession of the same.

On the 13th of April, 1909, *Mt. Anari Kunwar* and with her *Mt. Jamna Kunwar*, who was at that time, had the succession opened out, the next reversioner, executed a deed of gift in favour of *Ramhit Singh* and *Phirae Singh*. In this deed of gift they set themselves out as being entitled to and in possession of the property in dispute and they transferred the whole of their property in favour of the aforesaid *Ramhit Singh* and *Phirae Singh*. *Ramhit Singh* and *Phirae Singh* alleged that they came into possession and are in possession of the property in dispute; they add, however, that upon the death of *Mt. Anari Kunwar*, the *patwari* of the village made a report and had the name of *Mt. Jamna Kunwar* entered and their names removed. They applied to the Revenue Court for correction of this mistake, but in vain. Thus they were forced to come into the Civil Court and to ask that a decree might be passed in their favour declaring that they are in proprietary possession of the property in dispute and if this be not found, proved by the Court below, that a decree awarding possession in their favour may be passed.

In the written statement the execution of the deed of gift was denied. It was said.

that Ramhit Singh and Phirae Singh persuaded *Mt. Anari Kunwar* and *Mt. Jamna Kunwar* that they were better able to manage the *zemindari* property left by Bhagwan Singh, that the deed which was executed was understood by the two ladies to be merely a power-of-attorney conveying the right to Ramhit Singh and Phirae Singh to manage the estate. *Jamna Kunwar* said that the ladies had all along been in possession of the property in suit ever since the death of *Mt. Anari Kunwar*.

The Court of first instance dismissed the claim; it held that the fraud alleged by *Mt. Jamna Kunwar* was not proved, that execution of the deed of gift by the two ladies was established and that *Mt. Jamna Kunwar* had at the time of executing the deed only a right in expectancy which she could not legally transfer. The deed, therefore, under which Ramhit Singh and Phirae Singh sued conferred no title upon them.

The case was taken to the Court of the District Judge of Jaunpore. The view taken by that learned Judge was that the deed of gift was a deed properly and duly executed by the ladies with knowledge of what they were doing, that no fraud in this matter had been proved to the satisfaction of the lower Appellate Court. It went on to hold that the deed of gift was "not to a stranger, it was to the reversioners in expectancy, who would have been next reversioners" in the event of Bhagwan's mother pre-deceasing his widow. The mother was perfectly competent to relinquish her expectation of the life-interest, and by her doing so the plaintiffs became next reversioners and the widow, became *ipso facto* competent to gift the property or to be more exact to surrender her life-interest therein. It accordingly allowed the appeal and decreed the plaintiffs' claim for possession. There was a third defendant, who, it held, was unnecessarily impleaded, but we are not concerned with him in this appeal.

Mt. Jamna Kunwar has come to this Court and raised six pleas attacking the judgment of the lower Appellate Court. The sixth plea was not argued. Of the remaining pleas four attacked the deed of gift on the grounds that (1) it was not proved that the defendant had any independent advice, (2) that the gift had never been given effect to and the plaintiffs not having obtained possession under the deed cannot now sue for possession, (3) that

the defendant had no interest in the property in suit on the date when the deed of gift was executed and the deed conveyed no title to the plaintiffs, (4) that the gift of the defendant was a gift of an expectancy and was invalid. The fifth plea raised was that the plaintiffs were estopped from bringing the present suit. No argument was addressed to the Court on this last plea.

It is found by the lower Appellate Court that *Mt. Jamna Kunwar* knew what she was doing when she executed the deed of gift. It is a finding of fact and if there was any necessity I agree that that finding of fact is a proper and right finding.

My attention was directed in the course of the arguments to the written statement. Paragraph 16 of that statement says that *Mt. Jamna Kunwar* and *Mt. Anari Kunwar* had been all along in possession of the property in dispute since the death of Bhagwan Singh and since the death of *Mt. Anari Kunwar*, *Jamna Kunwar* had alone been in possession; the plaintiffs had never been in possession of the property. The lower Appellate Court has also held that the plaintiffs never have been in possession. Viewed then from the standpoint taken by *Mt. Jamna Kunwar* in the written statement, the deed of gift was a deed of gift of the property in dispute executed by her when in possession of the property, by whatever means that possession was obtained. The deed was a deed executed by *Mt. Anari Kunwar* then in possession of her deceased husband's estate and assented to by *Mt. Jamna Kunwar*, the next reversioner, in favour of the present plaintiffs who were then reversioners and now are the next reversioners.

A great deal of argument was addressed to the Court upon the ground that when *Mt. Jamna Kunwar* executed the deed of gift, she was trying to effect a transfer of a right in expectancy. Such transfer is forbidden by the Transfer of Property Act and in consequence, it was urged, conveyed no title of any kind to the plaintiffs. It seems to me that this is practically an attempt to get this Court to look at the transaction from a wrong point of view. In *Ramphal Rai v. Tula Kuari* (1), a Full Bench of this Court did hold that the consent of the heir-presumptive to an alienation was not sufficient to defeat the rights of a more remote reversioner. The view taken by this

Court was considered by their Lordships of the Privy Council in *Bajrangi Singh v. Manokornika Bakhsh Singh* (2). Their Lordships, however, held that the view taken by this High Court in the former case "is at variance with the principle itself, and is not in accordance with the practice in other parts of India in which the *Mitakshara* Law prevails." They considered that the Allahabad High Court was trying to establish an unnecessary limitation upon the widow's power of alienation. They preferred to follow the view taken in *Radha Shyam Sircar v. Joy Ram Senapati* (3), where it was held "that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible."

In the present case *Mt. Jamna Kunwar* was the next heir-presumptive; she beyond all doubt consented to the transfer and is no longer entitled to oppose the same.

I agree with the lower Appellate Court that when the deed was executed and under the circumstances in which it was executed, *Mt. Anari Kunwar* could surrender her life-interest in the estate, if *Mt. Jamna Kunwar* consented to the transfer.

I accordingly dismiss this appeal with costs, which in this Court will include fees on the higher scale.

Appeal dismissed.

(2) (1908) 30 All. 1=35 I. A. 1=5 A. L. J. 1=12 C. W. N. 74=9 Bom. L. R. 1348 (P.C.).

(3) (1890) 17 Cal. 896.

A. I. R. 1915 Allahabad 168.

TUDBALL AND RAFIQUE, JJ.

Ghasi Ram and another—Plaintiffs-Appellants

v.

Mt. Debi and another—Defendants-Respondents.

First Appeal No. 429 of 1913, decided on 7th April, 1915, from the decision of the Sub-J., Agra, dated 18th June, 1913.

Hindu Law—Joint family—Property acquired by gift is separate—Burden of proof is on them who allege it as joint—No lien on it for marriage expenses exists.

Prima facie a property acquired under a gift by one member of a joint Hindu family belongs exclusively to him; if other members of the family allege that it was treated as joint family property it is for them to prove it.

The fact that the expenses of the marriage of that member of the family, in whose favour the gift had been made, were met out of the joint family funds, gives the joint family no lien on the gifted property.

S. K. Dar—for Appellants.

A. P. Dube—for Respondents.

Judgment:—The genealogical tree which is set out in the judgment of the Court below will explain the relationship between the parties. The plaintiffs are some of the members of the family of Chiranjilal. They sue as against *Mt. Debi*, the widow of *Narain* and mother of *Gopal Das*, and they also implead other members of the family who have not joined them in the suit. Their case is that the family was joint family and that the property situated in the three villages *Baranda*, *Marhakar* and *Garhi Chandraman* is the joint family property, that *Mt. Debi* as widow of *Narain* and mother of *Gopal Das* had no title whatsoever to any share therein, that she only had a right of maintenance, that her name was entered in the Government records for the purpose of consolation only, that by reason of that entry she had sued for and obtained a decree for profits of a portion of the estate and that she had applied for partition of another portion. The plaintiffs, therefore, came into Court asking for a declaration that the property was the property of the joint family and the defendant *Mt. Debi*, had no title whatsoever thereto. In asking for this relief the plaintiffs also said that if in the Court's opinion they were not in legal possession of the property, then the Court might put them into possession and that they were ready and willing to pay the Court-fee in respect thereto. *Mt. Debi's* defence was that her husband, *Narain*, had separated from his brother in his life time, that she held the properties of *Baranda* and *Marhakar* as the mother of a separated Hindu. In regard to the property of *Garhi Chandraman* she pleaded that the property was her *stridhan*, that at the time of her marriage her grandmother and brother had gifted this property to her, but that the deed of gift was executed in the name of her husband, *Narain*, in whose name the property stood and after him in the name of *Gopal Das*

his son. She also pleaded that the plaintiffs were not in possession and were not entitled to a declaration in view of the terms of S. 42 of the Specific Relief Act. Four issues were framed, one as to the value of the property with which we are not concerned. Issue No. 2 is whether S. 42 is a bar to the suit. Issue No. 3, is the property in suit joint property of the parties or separated property? Issue No. 4, did defendant get Garhi Chandraman property from her mother and her brother and is it ancestral property? The defendant gave evidence as to the alleged separation. The Court below rejected that evidence as valueless and held that the family was a joint family. In respect to the properties in Baranda and Marhakar it held that they were joint family property. In respect to the property in Garhi Chandraman it held that this property had been gifted to Narain, that it was his separate property, that it descended to his son and from his son to the defendant, *Mt. Debi*. It held, that by reason of the decree for profits which *Mt. Debi* had obtained (which profits had been paid by the plaintiffs) and also by reason of the fact that Garhi Chandraman was in the possession of the defendant and not of the plaintiffs, that the plaintiffs' suit for declaration was barred by S. 42 of the Specific Relief Act and, therefore, it dismissed the suit *in toto*. The plaintiffs have come here on appeal. It is urged that in view of the circumstances of the case and the fact that the plaintiffs are what has been termed collecting co-sharers *i.e.*, co-sharers who collect the income from the tenants, that it was unnecessary for the plaintiffs to sue for anything else beyond a declaration at least in respect to the two villages, Baranda and Marhakar. It is urged that even if that were necessary, the plaintiffs had all along been perfectly willing to pay necessary Court-fees and that their suit ought not to have been dismissed without giving them a chance of paying the necessary fee. In regard to Garhi Chandraman it is urged that as the gift to Narain had been made at the time of the marriage, the property belonged to the joint family because the expenses of the marriage had been met out of joint family funds. On behalf of the respondent it has been urged that the evidence on the record clearly proves the separation of Narain from his brother and that on this ground also the plaintiffs' suit ought to have been dismissed. In so

far as the actual facts are concerned, we have no hesitation whatsoever in agreeing with the Court below that the alleged separation between Narain and his brother is not proved. A perusal of the evidence is quite sufficient to show that the statement of the witnesses is not worth the paper on which it is written. The presumption is in favour of jointness and it was for the defendant to prove the alleged separation. In our opinion she has utterly failed to do so. In regard to the village Garhi Chandraman we cannot accept the argument which is now put before us. The gift was clearly a gift in the name of Narain. The fact that Narain's marriage expenses were met out of joint family funds gave the joint family no lien on the gifted property. Of course it was perfectly possible for this gifted property to have been treated by the family as such. But if this were the case it was the plaintiffs' duty to prove it by evidence. *Prima facie* the gift to Narain made Narain the sole owner of the property, which would descend to his son and on his son's death to his widow. *Prima facie* it was not joint family property at all. It was for the plaintiffs to prove that it had been treated as such. But on that point they have not given any evidence whatsoever. In regard to this village we are of opinion that the decision of the Court below was perfectly correct. There remains the question of S. 42 of the Specific Relief Act in respect to the villages Baranda and Marhakar. *Mt. Debi* sued for her share of the profits of one of these villages. Her name being recorded in the Government papers the Revenue Court was bound to decree her claim. The fact that she sued is an admission that the opposite party was collecting the income of the property. Therefore, in so far as legal possession of a *zemindar* is concerned the actual possession was in the hands of the plaintiffs. We do not think that the mere fact that *Mt. Debi* sued and obtained her share of the profits from the opposite party would be sufficient reason for forcing the plaintiffs to bring a suit for possession. The question of title could only be decided in one way in the Revenue Court by reason of the provisions of the Tenancy Act. Otherwise it would have been open then to the plaintiffs to contest *Mt. Debi's* title to the share which stood in her name. This is one of those cases in which it is difficult to say which party is in possession. But in any case the action of the

lower Court was wrong in dismissing the suit in view of the fact that the plaintiffs had in their plaint offered to pay the necessary Court-fee. In the circumstances of the case however, we are of opinion that it was unnecessary for the plaintiffs to sue for anything more than a declaration. The result, therefore, is that the plaintiffs' suit will be decreed in respect to the properties in *Mozas Baranda* and *Marhakar* i.e., the declaration for which they ask is granted. In regard to the property of *Garhi Chandraman* the suit will stand dismissed. Parties will pay and receive costs in proportion to failure and success in both Courts.

Appeal partly allowed.

A.I.R. 1915 Allahabad 170.

CHAMIER AND PIGGOTT, JJ.

Manorath Choube and others—Plaintiffs-Appellants

v.

Mt. Sumera and others—Defendants-Respondents.

First Appeal No. 126 of 1914, decided on 15th February, 1915, from the order of Addl. Sub-J., Gorakhpur, dated 12th May, 1914.

U. P. Land Revenue Act (III of 1901), S. 233 (k)—Suit by reversioner for share subject of partition is not barred.

A suit in which the plaintiff claims to have become entitled, by inheritance as reversionary heir, to a share which had been dealt with in a particular way at a partition, is not barred by S. 233 (k) of the U. P. Land Revenue Act III of 1901. (8 I. C. 807, Dist) [P. 170, C. 2]

Haribans Sahai—for Appellants.

M. L. Agarwala—for Respondents.

Judgment:—This was a suit for possession of a certain *zemindari* share, with regard to which it is sufficient to say that it was made up of shares which had at one time belonged to two brothers named *Bhola* and *Ram Harak*. The suit was contested on somewhat different grounds by two sets of defendants and the pleadings raised a number of issues of facts and law. At a late stage of the trial in the Court of first instance, a special plea was put in to the effect that the suit as brought was barred by S. 233 of the Land Revenue Act (Local Act III of 1901). An issue having been framed on this point, the learned Munsif came to the conclusion that the suit was so barred, and he dismissed it accordingly. On appeal the lower Appel-

late Court, following out a train of reasoning which we do not think it necessary to describe in detail, came to the conclusion that the suit was barred by the aforesaid section in so far as it related to the share which had been *Ram Harak's*, but not barred in respect of the share which had been *Bhola's*. The learned Additional Subordinate Judge accordingly passed an order remanding a portion of the suit, as originally brought, for trial on the merits under the provisions of O. XLI, R. 23, of the Code of Civil Procedure. The plaintiffs' appeal against this order in so far as it confirms the dismissal of a portion of their claim, namely the claim relating to the share which had been *Ram Harak's*. It is obvious that no part of the suit as originally brought is barred by S. 233-K of the Land Revenue Act. The case of *Lachman Das v. Hanuman Prasad* (1) has been misapprehended by the Courts below. The plaintiff in that suit was seeking to disturb the allocation of certain lands which had been made at a partition before a competent Revenue Court. In the present case the plaintiffs are not seeking to interfere in any way with the proceedings of the partition Court. They claim to have become entitled, by inheritance as reversionary heirs, to a share which had been dealt with in a particular way at a certain partition. What the learned Subordinate Judge probably had in his mind was the question whether a certain order passed by the Court effecting the partition might not have the effect of *res judicata* between the present parties in respect of a portion of the plaintiffs' claim or in respect of one or more of the questions put in issue between the parties. This may or may not be so, but the issues of titles raised by the pleadings require to be tried on the merits, taking into consideration also what was decided by the Revenue Court during the partition when certain questions of title were raised as between the present plaintiffs on the one hand and *Mt. Gajraji*, widow of *Bhola*, on the other. "With these remarks we accept this appeal, set aside so much of the order of the lower Appellate Court as refers to the share of *Bhola*, and remand the entire suit to the Court of first instance for decision on the merits. Costs of this appeal will be costs in the suit.

Appeal accepted.

A. I. R. 1915 Allahabad 171.

CHAMIER, J.

Moti Lal—Defendant-Applicant

v.

Gangadhar and others—Plaintiffs-Respondents.

Civil Revn. Petn. No. 6 of 1915, decided on 20th March 1915, from an order of the Sub-J., Mirzapur.

Civil P. C., (V of 1908), S. 115 and O. 20, R. 6—No revision against interlocutory order lies if decree in the case has been passed.

Where a Subordinate Judge has delivered judgment all that remains is the preparation of a formal decree, and no revision lies against an order on an interlocutory application. The remedy of the aggrieved party is by way of appeal against the decree in the case.

[P. 171, Col. 2.]

L. M. Banerji and P. L. Banerji—for Appellant.

S. N. Sen—for Respondents.

Judgment :—This is an application by the defendant in a suit brought against him by the respondents for dissolution of partnership and for accounts. The application is for revision of an order dismissing the applicant's objections to a Receiver's report, because the applicant failed to deposit in Court Rs. 220 as directed by the Subordinate Judge. It appears that the applicant's objections were filed on December the 2nd, 1914, and that he had at the same time applied for the issue of summonses to witnesses to support his objections. The order passed on that was "file with the record." Seven days later the case was taken up by the Subordinate Judge, who proceeded to examine the objections. He evidently came to the conclusion that many of the objections had been put forward in order to gain time and to prolong the proceedings, and he ordered that the objector should deposit Rs. 10 for each objection, or Rs. 220 in all to be awarded to the plaintiffs and the Receiver on account of costs if they appeared to be entitled to costs. The applicant having failed to deposit the money, his objections were dismissed. The plaintiffs thereupon withdrew their objections; the Subordinate Judge accepted the report of the Receiver and directed that a decree should be prepared for the sums specified in that report with costs and interest. By means of applications to

this Court the applicant endeavoured to delay the preparation of a formal decree; but this attempt was defeated by the other side, who managed not only to procure the preparation of the decree but also arrested the applicant in execution thereof even before the formal decree had been prepared. The proceedings in this case since December the 9th, 1914, have been certainly of an extraordinary character, particularly the proceeding in which the applicant was, so to speak, made to bet Rs. 10 on each of his objections. If I could see my way to interfering with the orders that have been passed, I should certainly do so, though I cannot say what would be the proper order to pass if the merits of the objections were enquired into. Under S. 115, Civil Procedure Code, this Court may call for the record of any case which has been decided by a Subordinate Court and in which no appeal lies. There has been some difference of opinion as to what amounts to a case within the meaning of this section. But there can be no doubt that a case had been decided before this application for revision was presented and that an appeal lay to this Court. The Subordinate Judge had delivered judgment in the case, and all that remained was the preparation of a formal decree. It is quite impossible for me, consistently with the decisions of this Court, to hold that this application is maintainable. The applicant's remedy is evidently by way of appeal against the decree, and the fact so much pressed on me by the applicant that an appeal will be a most expensive proceeding is no reason whatever for allowing this application.

I accordingly dismiss it with costs.

Application dismissed.

A. I. R. 1915 Allahabad 172 (1)

CHAMIER AND PIGGOTT, JJ.

Har Narain and others—Defendants-Appellants

v.

Balwant Singh and others—Plaintiffs-Respondents.

First Appeal No. 125 of 1914, decided on 10th February, 1915, from the order of 1st Addl Dist. J., Aligarh, dated 18th July, 1914.

Agra Tenancy Act (II of 1901), S. 79—Suit between tenants for encroachment is not governed by S. 79.

One set of tenants sued another set that the defendants had unlawfully encroached upon their holding and appropriated land belonging thereto. The *Zemindar* had nothing to do with the dispossession: [P. 172, Col. 1.]

Held, that the suit was not governed by S. 79 of the *Agra Tenancy Act*.

Shafi-uz-zaman—for Appellants.

Tej Bahadur Sapru—for Respondents.

Judgment :—This is an appeal by the defendants against an order of remand passed under O. XLI, R. 23, of the Code of Civil Procedure. The dispute out of which this suit arose was one between two sets of tenants with regard to the boundary between their respective holdings. The plaintiff's case is that the defendants have unlawfully encroached upon their holding and appropriated land belonging thereto. The first Court seems somehow to have arrived at the conclusion that the defendants had dispossessed the plaintiffs from a portion of their land acting on behalf of the *zemindars*, so that the dispossession must be held to have been effected by the *zemindars* and the plaintiff's only remedy was one by a suit under S. 79 of the *Agra Tenancy Act* (Local Act II of 1901). We agree with the learned District Judge that no suit under that section could have been brought on the facts stated in the plaint. We notice, moreover, the lower Appellate Court has found that there is nothing to show that the *zemindars* had anything to do with the dispossession of the plaintiffs from any portion of their holding. We dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 172 (2)

RICHARDS, C. J. AND PIGGOTT, J.

Parma—Applicant-Appellant
v.*Nek Ram*—Opposite Party-Respondent.

First Appeal No. 164 of 1914, decided on 27th March, 1915, from an order of the Dist. J., Agra, dated 18th September, 1914.

(a) *Probate and Administration Act (V of 1881), S. 50*—Notice is essential to set aside order of grant of letters of administration.

An order granting Letters of Administration to a particular person should not be cancelled without giving him notice. [P. 173, Col. 1.]

(b) *Civil P. C., (V of 1908), Ss. 114 and 151—Apart from S. 50 of Act V of 1881 Court can reconsider order of grant of letters under S. 114 and exercise its inherent powers—Probate and Administration Act (V of 1881), S. 50.*

It is open to a District Judge to reconsider an order granting Letters of Administration, whether under the provisions of S. 114 or under the inherent powers of the Court recognized by S. 151 of the Code of Civil Procedure, apart altogether from the provisions of S. 50 of the Probate and Administration Act itself. (49 I.C. 133). [P. 174, Col. 1.]

(c) *Probate and Administration Act (V of 1881), S. 23*—Interest in property of deceased is necessary for grant of letters.

A Court ought never to grant Letters of Administration to the estate of a deceased person without having good *prima facie* evidence that the applicant has such an interest in the estate of the deceased as would entitle him to a grant of Letters of Administration. A person who satisfies the Court that he is the heir or one of the heirs of the deceased, has such an interest. A creditor also has an interest. [P. 174, Col. 1.]

Nihal Chand—for Appellant.

S. K. Das—for Respondent.

Richards, C. J. :—The facts connected with this appeal are as follows. It is alleged that one Sanwalia died intestate. The property left by him is said to be only a house in a village. One Parma applied for Letters of Administration to the estate of deceased and obtained an order on 18th of September, 1914. The order was in the following terms: "Read application from the above-named petitioner, dated 18th August, 1914, requesting that Letters of Administration to the estate of Sanwalia, deceased, may be granted to him under Act V of 1881. Valued at Rs. 400. Order: This case has been uncontested. I grant Letters of Administration to Parma applicant for the estate of his deceased nephew Sanwalia; provided that if the

valuation of the house made by the Collector exceeds the amount stated in the application the deficiency in fees shall be recovered." It appears that later on the same day one Nek Ram came into Court, with the result that the learned Judge passed the following order: "After passing the above *ex parte* order a petition has this day been filed. I cancel the above order and frame the following issue:—Is Parma the uncle and heir of the deceased Sanwalia?" Parma has come in appeal to this Court, contending that the order granting him Letters of Administration should not have been cancelled by the learned Judge without giving him notice. Nek Ram's contention admittedly is that Sanwalia died intestate and without heirs and that according to custom, the house reverts to him as *zemindar*. It seems to me that Parma having obtained an order granting him Letters of Administration, that order ought not to have been cancelled without giving him notice. This in itself is sufficient to dispose of the present appeal. I think, however, that it is right to point out a few matters to the learned Judge. It does not appear upon what evidence, if any, the order in favour of Parma was made. In my opinion a Court ought never to grant Letters of Administration to the estate of a deceased person without having good *prima facie* evidence that the applicant has such an interest in the estate of the deceased as would entitle him to a grant of Letters of Administration. A person who satisfies the Court that he is the heir, or one of the heirs, of the deceased has such an interest. A creditor also has an interest. In an insolvent's estate the creditor's interest is even greater than that of the heirs. I think even assuming that Parma had satisfied the Court that he had an interest as one of the heirs of the deceased, it ought to have ordered him to give security for the due administration of the estate of the deceased. I think also that it is a wise precaution for the Court to have clear evidence as to who are the other persons interested in the estate and as a general rule, to direct that such persons should get notice either that the application has been made or at least that the application for Letters of Administration has been allowed. The question whether or not the *zemindar* Nek Ram has such an "interest" as will entitle him to oppose the grant of Letters of Administration, will probably arise. It

seems to me that Nek Ram has no "interest" in the estate of the deceased. His contention is that the moment Sanwalia died without heirs the house reverted to him. It is contended on behalf of Nek Ram that if Letters of Administration are once granted to Parma, the result would be that under the provisions of S. 14 and S. 59 the *zemindar* will never afterwards be allowed to say that Sanwalia died without heirs. If this is really the result of the provisions of the sections I have mentioned, it certainly would seem only just to allow Nek Ram an opportunity of contesting that Parma is the heir of the deceased. I, however, do not think that we are called upon to decide this question in the present appeal. I would set aside the order of the learned District Judge cancelling the order granting Letters of Administration and send the case back to him, directing him to send notice of the objection of Nek Ram to Parma and then to proceed to consider the matter according to law.

Piggott, J.:—I entirely concur in what the learned Chief Justice has said and in the order proposed by him. It is only in regard to one matter that I wish to add a few words. In the arguments addressed to us in support of this appeal, it seemed to me that in the background of the appellant's case there lay the contention that he was in the position of a person holding Letters of Administration which could not be revoked at all, except under the provisions of S. 50 of the Probate and Administration Act, V of 1881. Now no doubt the Court which has granted Letters of Administration has jurisdiction to take action under that section. But in the circumstances of the present case it is clear that other points would have to be considered before the case could be tied down to the provisions of that particular section. In the matter of an application for Probate or Letters of Administration, it is often impossible to apply strictly those rules of the Code of Civil Procedure which govern *ex parte* proceedings in cases where there is a defendant named at the very outset, on whom notice is required to be served. Nevertheless the Court possesses, as is recognised by S. 151 of the Code of Civil Procedure, inherent powers to make such orders as may be necessary for the ends of justice, or to prevent the abuse of the process of the Court. When Nek Ram laid his petition before the Court, what he desired to contend was

that he was entitled to be heard *before* any Letters of Administration were granted to Parma at all. He still desires to raise this point in spite of the fact that an *ex parte* order allowing Parma's application had been passed before he was able to lay his petition before the Court. I only wish to say that it will be open to the learned District Judge when the matter comes back to him, to consider whether under the provisions of S. 114, or under the inherent powers of the Court recognised by S. 151 of the Code of Civil Procedure, he can or ought to reconsider his *ex parte* order in favour of Parma apart altogether from the provisions of S. 50 of the Probate and Administration Act itself.

Richardas, C. J.—I agree with what my learned colleague has said.

By the Court :—The order is that we allow the appeal, set aside the order of the Court below and remand the case to that Court for trial according to law. Costs will be costs in the cause.

Appeal allowed.

A. I. R. 1915 Allahabad 174.

KNOX, J.

Kallu and another—Defendants-Appellants

v.

Parbhu Lal—Plaintiff-Respondent.

Second Appeal No. 1575 of 1914, decided on 11th February, 1915, from the decision of Second Addl. J., Aligarh.

Contract Act (IX of 1872), S. 16—Burden of proof of undue influence is on executant in absence of other circumstances—Chance of Compounding criminal case does not create undue influence.

Where a *kabuliat* registered three days after its execution contained nothing in the document itself to show that it was a hard bargain or otherwise of an exacting nature, it is for the executant to prove that it was executed under undue influence. The fact that a compoundable criminal case was pending between the parties and the prosecution was ready to compound the offence and to withdraw the charge the *kabuliat* was executed and that the executant was ready to execute it on condition of the withdrawal of the charge, would not lead to the necessary inference that the other side was in a position to dominate the will of the executant and that he used that position to obtain an unfair advantage upon him. (22 All. 224, *Ref.*). [P. 175, Col. 2.]

Haribans Sahai—for Appellants.

Judgment :—This is an appeal brought by Kallu and Karamat-ul-lah who were defendants in the Court of first instance.

The plaintiff was one Parbhu Lal. The lower Appellate Court has found upon evidence certain matters to which I shall presently refer, and the learned Vakil who appeared for the appellants has more than once stated in his argument that he accepts the findings of fact as found by the lower Appellate Court. His contention is that the lower Appellate Court has drawn wrong inferences of law, and not that it has arrived at wrong findings of fact. It is admitted in the case that the appellants executed a *kabuliat* on the 4th of November, 1909, in favour of the respondent and that that *kabuliat* was afterwards registered.

The findings of fact are that one Abdullah was co-sharer in the village, that the land in suit was Abdullah's *sir* land, that Abdullah's proprietary rights passed by sale to Ahmad Bux and that Ahmad Bux in turn transferred the rights, whatever they were, to the respondent. The result of all these transactions was that Abdullah became an ex-proprietary tenant of this land. After becoming ex-proprietary tenant Abdullah sub-let those tenant rights to the appellants. Later on the respondent ejected Abdullah on the 3rd of August, 1909. With that ejection of Abdullah went the tenant rights of the persons to whom Abdullah had sub-let them, *i.e.*, the appellants. Three months after this had come and gone the appellants executed the *kabuliat* in favour of the respondent. It is not easy at first sight to see how this position can be got out of but his arguments addressed to me have been very ingenious.

They are (1) that when Abdullah was ejected the tenant rights of Abdullah enured in favour of all the co-sharers. The appellants were two of such co-sharers. I believe there were eight in all, and the tenants' rights enured partly in favour of other co-sharers in the *mahal*. It is not easy to see what follows from this argument. The position laid down is unassailable; it amounts to this and no more, that the appellants by reason of being co-sharers of the whole *mahal* become co-sharers of the rights vested in Abdullah, nothing more.

In the course of the delivery of this judgment I was informed that what the argument meant was that upon the ejection of Abdullah the ex-proprietary rights of Abdullah became extinguished and the land which Abdullah held became ordinary land. Press this as far as it can be

pressed, it will not extend to the necessary inference that the appellants became tenants or joint tenants in the land in dispute. In the course of the argument allusion was made to the evidence of the *patwari*, who is said to have stated that this land became the *kasht* of all the proprietors. This may or may not be a correct interpretation of what the *patwari* did say. The mere fact that land was written down in the *patwari* papers as *khudkasht* land will not make that land *khudkasht*, more than an entry in the *patwari* papers will be required to establish this, when disputed, as in this case.

Then the second contention is that the appellants never got possession. The lower Appellate Court has considered this question and finds that the land covered by the *kabuliat* is cultivated by the appellants or their relatives. This is tantamount to a finding that the *kabuliat* was acted upon. But there is still further contention and that is that the *kabuliat* is void, inasmuch as it was executed under undue influence and my attention was directed to S. 16 of Act IX of 1872. This point also did not escape the consideration of the lower Appellate Court. That Court found itself unable to deal with this issue and referred to the Court of first instance the following issues:—“Whether the defendants executed the said *kabuliat*, dated the 4th November, 1909, through undue influence, and was that influence exercised by the plaintiff or by anybody else acting on his behalf?” In the order of remand the Court was directed to take such additional evidence as may be necessary for a proper decision. The finding returned was that the defendants were unduly influenced to execute the *kabuliat*; because there was a criminal case pending between the parties under Ss. 352 and 447 of the Indian Penal Code and the plaintiff said he would not withdraw it unless the defendants executed the *kabuliat*. The lower Appellate Court considered this finding and disagreed with it. It held that if the defendants agreed to execute the *kabuliat* on the 1st November, 1909, because the plaintiff withdrew his charges against them under those sections, it was not undue influence but consideration and that the defendants were the gainers by the *kabuliat*, because they had otherwise no right to hold the land in question. Section 16 lays down that “a contract is said to be induced by

‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.” The criminal case was a charge of offences punishable under Ss. 447 and 352. Neither offence is a grave charge and both the offences are offences which the law permits parties to compound. Seeing that this particular *kabuliat* was both executed and registered some three days after it was executed, the burden of proving undue influence would lie on the appellants. The words of S. 16 of Act IX of 1872 are important; they go on to say that “where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.” The words ‘themselves show that this Cl. 3 applies only to a transaction which on the face of it or on the evidence adduced appears to be unconscionable. It would be a very long step indeed to take to say that, under the circumstances which have been found by the lower Appellate Court that the execution of this *kabuliat* would be an unconscionable transaction. The probability is that the respondent was for some reason very anxious to get this *kabuliat* executed, but there is nothing in the *kabuliat* itself to show that it was a hard bargain or otherwise of an exacting nature, even if we go so far and hold that a criminal case of a nature here represented had sprung up between the parties. The fact that the prosecutor was ready to compound the offences and to withdraw the charges if the *kabuliat* was executed and that the appellants were ready to execute the *kabuliat* on condition of the withdrawal of the charges, would not lead to the necessary inference that the respondent was in a position to dominate the will of the appellants and that he used that position to obtain an unfair advantage upon them. The appellants are Muhammadans, the respondent is a Hindu and a *mahajan*. There is nothing to show that there had been any previous money transactions between the parties and that they, therefore, started in this race unfairly. This Court has had occasion to consider this

very question in *Goberdhan Das v. jai Kishen Das* (1). That case, it is true, was decided before S. 16 of the Indian Contract Act had been amended, but the amendment does not seem to make this case without value as a precedent. The observations of the Chief Justice, Sir Arthur Strachey, lay down what is meant by undue influence. The learned Chief Justice says, referring to that particular case: "I have no doubt that at the time when he executed the submission he was to some extent, at all events, in fear of the criminal proceedings, but he does not say a word to suggest the conclusion that the plaintiff or any one else took advantage of his state of mind to apply any pressure or exercise any influence to procure his consent. It cannot be held that a state of fear by itself constitutes undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement." Nothing of this kind has been alleged or proved in the present case, and I hold that the lower Appellate Court was right in its finding that the execution of the *kabuliati* was not brought about by undue influence on the part of the respondent.

One more contention was pressed before me and that was that the respondent was not entitled to bring this case without joining as parties to the case the other co-sharers. Section 194 of Act II of 1901 was cited in support of this contention, also that if the respondent could sue alone he was not entitled to recover anything more than his share of the rent. But this contention entirely overlooks the finding that a special *kabuliati* has been executed and registered in favour of the respondent. The respondent is suing upon that registered *kabuliati* to which he and none of the other co-sharers was a party. The case appears to me to fall under Cl. 2 of S. 194. There was a special contract between the parties, the respondent was entitled to recover separately his share of the rent payable by the appellants. It would be for the *lambardar* and the co-sharers to consider whether they are entitled to any part of this rent and to sue for it, if necessary.

None of the other pleas in the memorandum of appeal were pressed before me. In the course of the argument my attention was drawn to the case of *Lal Mahomed v. Kallanus* (2). I do not propose to say how far I agree with the learned Judges of the Calcutta High Court, but the case cited seems to me dead against the appellants. The learned Judges are careful to say that in S. 116 of Act I of 1872 the words "at the beginning of the tenancy" only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attained, and not to cases in which the tenants have previously been in possession. So far as the tenancy in this case is concerned, the appellants had not been previously in possession of the tenancy. As I pointed out in another part of this judgment, they may have been co-sharers but they were not co-sharers of this particular piece of land. The act which put him in possession was the act of the respondent following upon the registered *kabuliati*.

I dismiss the appeal.

Appeal dismissed.

A. I. R. 1915 Allahabad 177 (1)

TUDBALL, J.

Zorawar—Applicant

v.

Emperor—Opposite Party.

Criminal Reference No. 216 of 1915, decided on 26th March 1915, made by the S. J., Agra.

Criminal P. C. (1898), S. 122—Police officer's report is no evidence—Magistrate must enquire.

A Magistrate called for a report from the Sub-Inspector of Police as well as from the Tahsildar as to the fitness of particular persons to act as sureties in a case: the Tahsildar reported in the affirmative and the Sub-Inspector in the negative. The Magistrate accepting the report of the Police Sub-Inspector declined to accept the sureties:

Held, that the report of the Police Officer was not admissible in evidence and that it was the duty of the Magistrate to have taken evidence as to what was the basis of that report and he should have come to a decision thereon himself. [P. 177, C. 2].

FACTS appear from the following Criminal Reference made by the Sessions Judge of Agra:

REFERRING ORDER.

Zorawar was ordered by a Deputy Magistrate of the Muttra District to furnish security for good behaviour under Section 118 of the Criminal Procedure Code. Two persons offered themselves as sureties. The Deputy Magistrate called for a report from the Tahsildar as to the sufficiency of the security offered, and also as to the fitness of these persons to act as sureties. The Tahsildar recorded the evidence of six witnesses who all stated that these two persons were men of position and respectability and were in every way fit to act as sureties and he also found that the security offered by them was sufficient. The Deputy Magistrate also called for a report from the Sub-Inspector of the Police circle in which Zorawar lives. The Sub-Inspector reported that one of the persons was a nephew of Zorawar and that the other appeared to be associated with Zorawar in his criminal practices. The Deputy Magistrate thereupon, ignoring the report of the Tahsildar and accepting the report of the Sub-Inspector, passed an order declining to accept the security offered. It is clear that the procedure of the Deputy Magistrate was illegal. He should not have come to a decision as to the fitness or unfitness of the persons to act as sureties merely on a one-sided report of the Sub-Inspector, which was not evidence. It was for the Magistrate him-

self to make enquiries as to their fitness. The Magistrate appears to be unaware of the ruling of the Allahabad High Court, *Emperor v. Pirthipal Singh* (1), which was followed in the cases of *Emperor v. Tota* (2) and *Emperor v. Balwant* (3).

Judgment.—In so far as the Magistrate's order refusing to accept the sureties is concerned, that order must be set aside. It is so obviously based upon the report of the Police, which is no evidence in the matter. In the evidence on the record there is no reason whatsoever to be discovered why the sureties should not be accepted. If any information was derived from the Police report, it was the duty of the Magistrate to have taken evidence as to what was the basis of that report and he should have come to a decision thereon himself. I, therefore, accept the reference. I set aside the order of the Magistrate and direct that the sureties offered be accepted, the necessary bond be taken and Zorawar released from prison. In regard to what the learned Sessions Judge has said in reference to alterations in the record of the case, I express no opinion, nor is it necessary for me to do so.

Order set aside.

(1) (1898) A.W.N. 154.

(2) (1903) 25 All. 272 = 1903 A.W.N. 36.

(3) (1904) 27 All. 295 = 1 A. L. J. 601 = 1904 A. W. N. 231 = 1 Cr. L. J. 912.

A. I. R. 1915 Allahabad 177 (2)

KNOX, J.

Dodraj and others — Defendants—Appellants

v.

Mst. Natho—Plaintiff—Respondent.

Second Appeal No. 187 of 1915, decided on 23rd February 1915, from the decision of the Dist. J., Shahjahanpur, dated 29th September 1915.

Civil P. C. (5 of 1908), O. 41, R. 26—Findings returned by lower Court are not final, even though objections not filed.

Order XLI, Rule 26, of the Civil Procedure Code, 1908, provides that after the expiration of the period fixed by the Appellate Court to file objections to the finding returned by the Court of first instance, it should proceed to determine the appeal. The effect of not presenting a memorandum of objections within the period fixed is not that the finding becomes final: the Appellate Court can still go behind and upset it. [P. 178, C. 1.]

Lachmi Narain—for Appellants.

Judgment.—The lower Appellate Court has found upon evidence that *Musammatt Natho* was the *dharona* wife of Chet Ram and his heir. This finding is attacked in appeal. The contention is that the lower Appellate Court has erred in law in setting aside a finding returned by a lower Court when no objections had been taken in respect of it.

The lower Appellate Court had sent back to the Court of first instance this issue:—Is the plaintiff the widow of Chet Ram? If it is found that her statement is true, there should also be a finding whether the *dharona* form is a valid form of marriage?

The Court of first instance found that *Musammatt Natho* was not the widow of Chet Ram. It does not appear why it went on to consider the second of the issues returned to it, but it did, and it found that *dharona* was a prevalent form of marriage among Hindus.

A definite time was given for taking objections to these findings—no objection was taken within the time given.

The position before the lower Appellate Court then was this. Two findings had been returned by the Court of first instance, one finding under authority given, the second finding without authority given; but both findings only entitled to such weight as attaches to findings by a Court of first instance upon any issue before it. No finding of a Court of first instance on a question of fact is a finding of fact behind which the lower Appellate Court cannot go. Order XLI, Rule 6, never says that after the expiration of the period fixed for presenting a memorandum of objections, the finding becomes final.

It is easily conceived that a Court of first instance might return findings preposterous on the face of them and that for some cause, negligence or otherwise, no objection is taken within the period fixed; is the lower Appellate Court, which is a final Court in questions of fact, to be bound by a finding on the face of it preposterous? All that this Order XLI, Rule 6, says is that after the expiration of the period fixed the Appellate Court should proceed to determine the appeal. The Appellate Court is responsible for its finding and cannot shift the responsibility upon any one else. The present case is very like the case I have just mentioned.

The Court found *Musammatt Natho* was not a *dharona* wife, but it also found that *dharona* was a prevalent form of marriage.

The lower Appellate Court in proceeding to determine the appeal found that the evidence in favour of *Musammatt Natho* being a *dharona* wife was far more preferable than the evidence on the other side. This being the case, I hold that the lower Appellate Court would have failed in its duty and would have arrived at a wrong conclusion of fact on evidence, if it had blindly followed the Court of first instance.

The lower Appellate Court has arrived at its finding of fact upon evidence and in second appeal I have no right to go behind it. I dismiss the appeal.

Appeal dismissed.

A. I. R. 1915 Allahabad 178

KNOX, J.

Mulla—Applicant

v.

Emperor—Opposite Party.

Criminal Revn. No. 159 of 1915, decided on 8th April 1915, from an order of the S.J., Cawnpore.

Penal Code (45 of 1860), S. 456—Stranger caught inside house at 2 a. m. having entered by a closed door with criminal intent is guilty of S. 456—Burden of proving honest intention is an accused.

The accused who was a complete stranger was found inside the complainant's house at 2 A.M. in the morning having entered the house by a door which the complainant had taken care to secure at night. When arrested, the accused said that he had gone inside the house in connection with an illegal intimacy with the complainant's aunt, who was a widow: [P. 179, C. 1.]

Held, that the accused was guilty under S. 456 of the Penal Code. *Held*, further, that as the intent with which he went inside was a matter within the knowledge of the accused, the burden of proving that his intention was an honest intention lay on him. [P. 179, C. 1.]

Kailas Nath—for Applicant.

Malcomson—for the Crown.

Judgment.—The facts found in this case are as follows: Suraj Kumar, a Brahmin and cultivator left his house on the 26th of December 1914. His intention was to catch a train and go into Cawnpore. He took the precaution of having his house carefully closed for the night. He returned, having missed his train, somewhere about 2 A.M. He found the door which had been securely closed wide open.

He says that somewhere inside his house, he caught hold of Mulla, a *gadari*, who was trying to escape and that on Mulla's person were certain jewels, the property of Suraj Kumar. This portion of the evidence has apparently been discredited by both Courts and for the purpose of this case this alleged fact may be omitted from consideration altogether. The accused, when he was caught by Suraj Kumar, said that he had gone inside the house in connection with an illegal intimacy with Suraj Kumar's aunt, who is said to be a widow.

The facts then that have to be faced are a complete stranger is found inside a Brahmin's house at 2 A.M. in the morning having entered that house by a door which the Brahmin had taken care to secure at night. He is inside the house and when discovered is trying to escape. He does not, when arrested by the owner of the house, make any statement to the effect that he is there with any lawful intent. The intent with which he went was a matter within his knowledge, the burden of proving that his intention was an honest intention lies upon him. In the present case he alleges that he went with the intention of pursuing an intimacy, I will not call it criminal just now, but an intimacy with a Brahmin widow. He is not able to establish that any illegal intimacy of any kind had existed at any time between him and the Brahmin widow. Looking to the words contained in Section 3 of the Evidence Act, I hold that both the Courts below were right in holding that it had been fully proved that the accused had committed lurking house trespass by night and that it is very doubtful whether they erred in holding that an offence under Section 457 had been established against the accused.

I am asked to interfere in revision against this conviction and sentence, because no offence under Section 457, Indian Penal Code, has been made out and the conviction is bad in law. A long and laboured argument has been addressed to me which really rests on this, at its strongest point, that it was for the prosecution to establish criminal intention and that until they proved that criminal intention the accused was entitled to an acquittal.

The learned Vakil who appeared for the applicant took his stand upon the case of

Emperor v. Jangi Singh (1), and drew my attention in particular to the words to be found in this ruling at page 195: "His intention possibly was to obtain possession contrary to law, but this of itself would not constitute criminal trespass. Proof of an intention to commit an offence or to intimidate, insult or annoy was necessary. There was no evidence of any such intention, or from which such an intention might be reasonably inferred." The facts of that case are somewhat peculiar. A *zamindar* had a quarrel with an occupancy tenant and when he was absent from the village by reason of ill-health, he induced the *patwari* to record that the occupancy tenant had left the village and abandoned his holding, and thereupon took possession of it. The learned Chief Justice, who decided *Emperor v. Jangi Singh* (1), evidently arrived at the conclusion that the facts found in this case were not sufficient to establish a *prima facie* case of criminal trespass and it was necessary to consider further what was the intention of the *zamindar* who entered on this occupancy holding.

I was also referred to the ruling of *In the matter of the petition of Gobind Prasad* (2).

The line of argument in this case, if carefully considered, will be found to be much the same. In that particular case the Pleader who appeared to support the case went so far as to say that where an entry upon property is in itself illegal, that is sufficient to establish one of the criminal intents required by section 441, and it was held by Mr. Justice Straight "that the intent with which the act is done must be established by clear and convincing evidence of such character and description as the particular nature of the case requires." With all due respect to the learned Judge, this has, in my opinion, been too broadly stated and I note that it has not been followed by some of the Courts. Cases of this kind really rest upon the facts which are found. If those facts are such that a person of ordinary prudence and ability would come to the conclusion that they point to a guilty intent on the part of the accused, it is for the accused to rebut that guilty intention,

(1) [1903] 26 All. 194=1903 A. W. N. 230=1 Cr. L. J. 362.

(2) [1878-80] 2 All. 465.

and if he does not so rebut it, the guilty intent is as much found against him as his entry into or upon the property.

In *Sellamuthu Servaigaran v. Pallamuthu Karuppan* (3) the learned Judges who decided that case, and one of them was a Hindu Judge of great experience, referred to a previous case of *Queen-Empress v. Raya Padayachi* (4) and held that the law on this point was correctly laid down in that case: "Although there is no presumption that a person intends what is merely a possible result of his action or a result which though reasonably certain, is not known to him to be so, still it must be presumed that when a man voluntarily does an act, knowing at the time that in the natural course of events a certain result will follow, he intends to bring about that result. In the present case the ordinary and natural consequences of the petitioners' acts would be to annoy the owner of the house and to intimidate and annoy his servant who was holding possession for his master, and the petitioners, as reasonable men, must have known that such consequences would flow from their acts. They must, therefore, in my judgment, be held to have acted with intent to intimidate and annoy within the meaning of the section, and the petitions must be dismissed."

In a previous case of this Court which came before me where I had to do with a very similar case, *Emperor v. Ishri* (5), I held that when an accused was found inside the house of the complainant at midnight, and his presence was discovered by the wife of the complainant crying out that a thief was taking away her *hansli*, it was for the accused to prove that his intention was an innocent one and in that case I referred to a previous case of *Brij Basi v. Queen-Empress* (6), which I distinguished from the case before me. I see no reason to depart from what I then laid down.

The learned Vakil for the applicant drew my attention to another case, *Premanundo Shaha v. Brindaban Chung* (7).

(3) (1911) 9 I.C. 152=35 Mad. 186=12 Cr. L.J. 30.

(4) (1896) 19 Mad. 240=1 Weir 537.

(5) (1906) 29 All. 46=3 A.L.J. 652=1906 A.W.N. 279=4 Cr. L.J. 291.

(6) (1896) 19 All. 74=1896 A.W.N. 178.

(7) (1895) 22 Cal. 994.

In that case the learned Judges delivered themselves of certain observations which were *obiter dicta*, which otherwise went to support the contention set up by the Vakil.

In my mind to hold that if a stranger who is found inside a *zenana* at two in the morning can escape from the consequences of his act by saying that he came there at the bidding of the wife or other inmate, would be a most dangerous doctrine and the act is deserving of severe punishment. This brings me to the third point raised in this application *i.e.*, that the sentence of six months is unduly severe. I am not prepared to accede to this. The result is that I find the accused guilty under Section 456 of the Indian Penal Code, but I do not interfere with the sentence passed. The accused is said to be on bail, he will surrender to his bail and complete his sentence.
Petition dismissed.

A. I. R. 1915 Allahabad 180

TUDBALL AND RAFIQUE, JJ.

Har Prasad—Defendant-Appellant

v.

Sukhdevi Kunwar—Plaintiff-Respondent.

First Appeal No. 242 of 1913, decided on 2nd February, 1915, from the decision of the Addl. Sub-J., Mainpuri, dated 17th May, 1913.

Hindu Law—Will—Brothers got tenancy-in-common by the bequest to them in equal shares.

Where a Hindu made a Will providing that in the absence of a begotten or adopted son to him and after the death of his widow, his two brothers would take his property in "equal shares":

Held, that the two brothers got a tenancy-in-common and not a joint tenancy under the Will.

[P. 182, C. 2 & P. 183, C. 2.]

7 I.C. 697 Foll. 28 All. 38 Dist. and 23 Cal. 670 (P.C.) Ref.

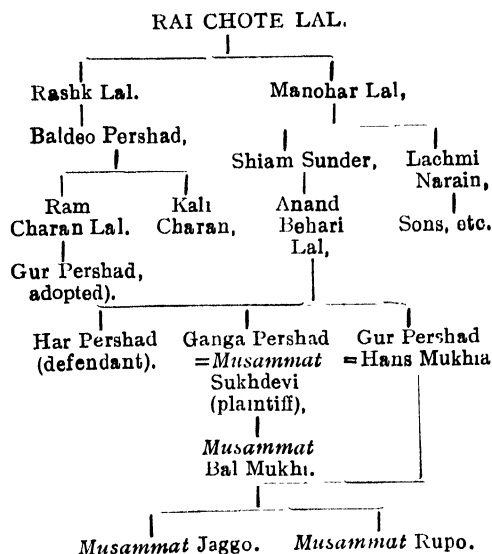
Tej Bahadur Sapru and Gulzari Lal—for Appellant.

Sunder Lal, Girdhari Lal Agarwala and Lachman Rao Dube—for Respondents.

Facts.—Har Pershad, Ganga Pershad and Gur Pershad were three brothers. Gur Pershad was adopted by Ramoharan Lal, an uncle of his. There was a partition between Gur Pershad and Ramoharan Lal and the former got half share of the property. On the 5th of May 1903, Gur Pershad made a Will, giving a life-interest in his estate to his wife with remainder

over to his two natural brothers, Har Pershad and Ganga Pershad. Gur Pershad died and then his wife and the property went to Har Pershad and Ganga Pershad. Ganga Pershad died on 27th March 1911 and his widow sued for possession of his share. The Subordinate Judge decreed the suit. The defendant appealed to the High Court.

Judgment.—This is a defendant's appeal arising out of a suit for possession brought by the widow of the defendant's deceased brother, Ganga Pershad, for recovery of her husband's separate estate, *plus mesne profits*. The Court below decreed the claim. The following genealogical tree will assist the understanding of the case. It is not a complete tree of the whole family of Rai Chote Lal, but is sufficient for the case:—



Ramcharan Lal adopted Gur Pershad, the son of Anand Behari Lal. The parties are *Kayasths* by caste.

It is common ground that a dispute having arisen between Ramcharan and his adopted son, there was a partition, and a half share of the former's property was handed over to Gur Pershad, and it is a half share in the estate thus acquired by Gur Pershad that is now in dispute.

Gur Pershad died on 21st May 1906. On 15th May 1903 he made a Will. He gave a life-interest in his estate to his wife with remainder over to his two natural brothers, Har Pershad and Ganga Pershad, "in equal shares" as stated in paragraph 5 of the Will.

The widow held the estate till her death on 28th May 1906 when the property went, under the Will, to Har Pershad and Ganga Pershad. It will be noticed that Gur Pershad disinherited his own two daughters, Jaggo and Rupo, though he gave them a maintenance allowance payable out of the income of the estate.

On 27th March 1911 Ganga Pershad died and Har Pershad is in possession of the whole estate.

The former's widow is the plaintiff and her case is as follows:—

(1) That the two brothers were separate;

(2) that the two brothers each took a separate share in the estate of Gur Pershad under the Will and that Ganga Pershad's share therein was his self-acquired property and separately enjoyed by him. The defence of Har Pershad was—

(1) That the devise to the two brothers was made to them jointly, so that on the death of one the other took the whole by survivorship.

(2) That even if this be not so, the two brothers threw the estate into the joint family estate and it was treated as joint family property and must now be held to be such, as the family has all along been joint.

(3) That in equity, if the plaintiff is legally entitled to the estate, she is bound to refund to him certain expenditure incurred by him.

The Court below has held on a construction of the Will, that each of the brothers took a half share in the estate of Gur Pershad and that they did not take jointly;

(2) that though there had not at any time been any partition or separation in the family of Anand Behari Lal and his sons, still the shares taken by the two sons had been held and enjoyed separately and that the widow was entitled to her husband's separate acquisition.

(3) That the plaintiff was entitled to Rs. 1,128 as mesne profits up to the date of suit after allowing defendant 10 per cent. for the costs of management, Rs. 1,200 allowances paid to Gur Pershad's daughters, Rs. 74 for survey expenses and Rs. 200 paid for owner's rate. The defendant appeals and three points are pressed before us:—

(1) That on a proper construction of the Will the two brothers took the estate

jointly and did not hold as tenants-in-common.

(2) That even if they got separate shares under the Will, still they treated it as joint family property and not as separate acquisitions and it thus became joint family property.

(3) That the defendant is entitled to credit for certain items of expenditure disallowed by the Court below.

To properly estimate the value of the evidence on the record it is necessary to set out the circumstances of this family.

Shiam Sundar Lal has two sons, Anand Behari Lal and Makund Behari Lal. He, Shiam Sundar, is still alive. Anand Behari, who is the defendant's own witness, admits that Shiam Sundar had got rid of the whole of the ancestral property belonging to the family many years ago, excepting the house in which the family lives. He has told a story as to how his father finally separated from his two sons dividing the family house and the moveables into three lots. The lower Court has disbelieved this and we have no doubt that it is a pure myth.

Be that as it may, on May 28th, 1906 when Gur Pershad's widow died, the only property possessed by Anand Behari and his sons was the family house and the moveables it contained.

Anand Behari's wife had inherited a small *zemindari* share in the village of Deora Satri from her own parents. She is still alive and still owns this property, which, however, is not the property of the joint family, though beyond doubt its income is expended on the support of the owner's household and its members.

Anand Behari started life in Government service on a salary of Rs. 10 a month in May 1880 and he is now at the end of 34 years' service only an *ahlmad* or clerk in the Collector's office with a salary of but Rs. 30 per mensem.

His father, Shiam Sundar Lal, is old and now paralyzed and earning nothing. His brother, Makund Lal, who is separate (as he says) from him, is *Kanungo* on a small salary in another district. The elder son, Har Pershad, defendant, began life as a Police clerk on Rs. 10 a month and had been in service about six or seven years when Gur Pershad's widow died. He was then a head constable, so that his income as such would have been at the utmost

about Rs. 25 a month. His duties forced him to live away from home.

Ganga Pershad at the time of Gur Pershad's widow's death was a youth of some 16 or 17 years, studying or rather pretending to study. He is not shown as having ever been a source of income. It will thus be seen that in 1906, when the estate came to the two brothers under the Will, the family was far from wealthy. All the ancestral property had long since vanished. Anand Behari supported himself on his income as a clerk and Har Pershad was away from home a head constable in the Police. Ganga Pershad was only a youth. When the widow died, Har Pershad resigned his appointment in the Police and came home to manage the property newly acquired.

There, therefore, had been no cause for separation or partition in the family of Anand Behari and his sons. There was no property to divide beyond the ancestral home, part only of which belonged to them. The father and elder son were each earning a separate income. In a sense they formed a joint family, but without any joint family property of any import.

We now consider the terms of the Will. It is to be found translated at page 21-A. We have examined the original, which is in Urdu. The testator left his estate to his widow for her life-time, in case the child which was about to be born to her should be a girl or being a boy should die at his birth. If the child should be a boy and he lived, the estate was to be his.

He also by a separate deed granted her authority to adopt and if she did adopt as directed the adopted son was to take the estate. In the absence of a son, the widow was to hold the estate for life with certain limited powers of alienation. After his death, his daughters were not to inherit but were to receive Rs. 25 per mensem each from the estate as maintenance, which they were empowered to enforce in a certain manner.

Then comes the fifth paragraph with which we are concerned:—

"I direct that after the death of my wife, and in the absence of a son begotten or adopted, my own brothers, Babu Har Pershad and Babu Ganga Pershad, shall be the owners of the aforesaid property, to

gether with all rights, 'in equal shares'. I do not think it proper to commit to writing the reason for my taking this course as it would bring disgrace on the family, etc., etc." The rest of the document does not affect the point now in dispute.

The appellant's case is that the devise contained in the Will is to the two brothers jointly. He even produced oral evidence to prove that the testator had expressed this intention. One witness even went so far as to say that though the words "*bahissa masavi*" (in equal shares) usually mean "in equal shares", still in the Will they meant "jointly."

We are also asked to consider the decision in *Mankamma Kunwar v. Balkishan Das* (1), wherein it was observed that under the English Law a conveyance of land to two or more persons without words indicating an intention that they were to take as tenants-in-common constitutes a joint tenancy. The reply to this is a simple one. The Will in the present case clearly uses language indicating that the two brothers were to take the estate as tenants-in-common, for they were to take in equal shares. Furthermore, we would call attention to the language used by their Lordships of the Privy Council in *Jogeshwar Narain Deo v. Ram Chandra Dutt* (2), which was quoted in the case of *Gopi v. Jaldhara* (3): "In the first place, it appears to their Lordships that the learned Judges of the Madras High Court were not justified in importing into the construction of a Hindu Will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu Law except in the case of co-parcenary between the members of an undivided family." It is urged that the testator was on bad terms with his adoptive father and had great natural affection for his own father and brothers who formed a joint family, and that while he was dis-inheriting his own daughters, would not have wished to let the property go to the daughters of his brothers who at that time had no male issue. There is no force in any of these pleas. The brothers were not old men but young, and there was every probability of their having male issue and there is the plain simple language of the Will, which directed that the two brothers

were to take "in equal shares". We have no hesitation in holding that the Will in clear terms created a tenancy-in-common; moreover, we agree with the lower Court in holding on the second plea that the two brothers treated the tenancy as one in common and did not treat it as joint family property, which is the second plea raised before us and which we now proceed to discuss.

We have already noted that when this property came to the two brothers in 1906, the family was possessed of no joint family property except the ancestral house; that Anand Behari and Har Pershad were both separately earning small incomes by Government service, while Ganga Pershad (in 1906) was only a youth of 16 or 17 years of age. He died in 1911. We are asked to consider the following evidence: (1) The statements of Anand Behari Lal, Chimman Lal and Angan Lal,

(2) the accounts of the family produced by Angan Lal.

(3) The *khwats* of some of the villages concerned.

(4) The accounts of a certain cloth seller.

(5) A number of bonds in favour of Har Pershad and Ganga Pershad. The oral evidence is to the effect that Anand Behari and his two sons lived jointly and that the income of the new estate was thrown into the family chest and treated as joint family income. The evidence of Chimman Lal and Angan Lal is of little use, for they had no personal knowledge of the accounts kept. They are not in a position to say more than that the family to all outward appearance lived like a joint family.

Anand Behari Lal, of course, was in a position to testify fully on the point and his evidence would carry considerable weight, if it had been supported by the family account books. He is far from being a disinterested witness, for if his and the defendant's contention be correct, then he himself has an interest in the property now in suit as he is one of the joint family with the defendant and his sons.

He stated that the income of the property all came into his hands and he defrayed therefrom all the expenses of the family, that he maintained accounts by entering all items of expenditure and

(1) (1905) 28 All. 38=1905 A.W.N. 170.

(2) (1896) 23 Cal. 670=23 I.A. 37 (P.C.)

(3) (1910) 7 I.C. 697=33 All. 41.

income on slips of paper from which he from time to time wrote up the account books. He admitted that he made deposits in the Post Office Savings Bank in the names of himself and his two sons, each having a separate account. He had to admit that mutation of names was made only in favour of his two sons and not of himself, and that on the death of Ganga Pershad mutation was again not made in his favour, though, if his story be true, his name should certainly have been recorded especially as he was the managing member. The excuse he gives is that he was in Government service in the district where the property was situate, but Government rules do not forbid Government servants from inheriting property. The latter have merely to declare all properties belonging to themselves and their near relatives. He further had to admit that on the death of the widow of Gur Pershad, when under the Will the property went to his two sons, a claim was put forward to it on behalf of the two daughters of Gur Pershad (*Musammat Jaggo* and *Musammat Rupo*) and the Revenue Court of first instance passed an order in their favour, which was upset on appeal made by Har Pershad. In that case he appeared and acted as guardian on behalf of the two daughters, but was subsequently removed from the post and another person appointed. It thus appears that he at first at least was hostile to the claim of his two sons. As to his accounts, we note that these were not put forward by the defendant at the proper time. They were produced very late in the case and an affidavit was filed by Har Pershad to excuse the delay. It was to the effect that his father would not let him have them, saying he would produce them when he gave his evidence. We note that some other accounts in regard to the funeral expenses of Ganga Pershad, which also, if genuine, must have been in the hands of Anand Behari, were not put forward at the proper time and that as Anand Behari is greatly interested in the suit, he could have had no reason for keeping back the family accounts. An examination of these accounts, as pointed out by the Court below, will show that they have not been regularly maintained. They do not show the daily income and expenditure. A whole month's income and expenditure are frequently shown under one date,

though, if the story of the slips be true, the details were all available. Finally, Anand Behari Lal had to admit that in a former case in regard to the village of Shahbaspore he had testified that no daily accounts had been kept and that he maintained no accounts whatever of the family expenditure. Combining this with the very late and suspicious production of the accounts in the present suit, we have no hesitation in describing them as "specially manufactured for the purposes of this suit." We agree with the lower Court in rejecting them as unworthy of any trust.

Again, this witness had to admit that there were separate accounts in the Post Office Savings Bank in the names of his two sons and a third one in his own name.

Gur Pershad's widow died in May 1906. A considerable period must have been taken up by the contested mutation case.

On 10th December 1907 the two accounts were opened in the names of the two sons with a deposit in each case of Rs. 200. Anand Behari states that the rules would not allow him to deposit more than Rs. 200 at a time in any one account, therefore he opened two accounts. The plea is absurd, for he could have made a deposit every day. Moreover an examination of the two accounts shows that up to the time of Ganga Pershad's death in 1911 only five deposits were made in each of the two accounts, that they were all made on the same dates for each account and with one exception the sum deposited in each account was exactly the same. The one exception is that of the 30th April 1908 when Rs. 150 was deposited in Har Pershad's account and Rs. 100 only in Ganga Pershad's account. Excepting the first deposits all were below Rs. 200.

These accounts were opened only when the estate came to the two sons and they are a clear indication that the income, far from being treated as a joint family income, was divided half and half and two separate accounts opened in the Savings Bank.

We do not place any value thus on the evidence of Anand Behari, for he has not hesitated to produce false documentary evidence.

The *khewats* prove nothing. In the case of some of the villages the names of Har Pershad and Ganga Pershad were recorded without any specification of shares, but in the cases of other villages

they were recorded as owners in equal shares.

As for the accounts of the cloth-seller, they merely show that an account was opened with him in the name of Anand Behari and that purchases were made, now by one son and then by the other and some times by Anand Behari himself. This in itself proves nothing to the point.

Lastly, we are asked to consider the fact that loans were made and bonds taken in favour of both the brothers. We fail to see any assistance in this to the defendant's case. Ganga Pershad was but a youth and Anand Behari his guardian. If the family accounts had been maintained or true account books produced, these bonds might perchance have given some support to them. One loan was contracted on a bond executed by the two sons and Anand Behari signed as a witness. If the family had treated the estate as joint family property and the loans were made from joint funds, Anand Behari as manager ought to have carried out these transactions in his own name.

Where the two brothers inherited the property in equal shares, the burden of proof that after the inheritance they threw the property into the family hotch-potch, is upon those who assert it.

There is no presumption that this was so. The evidence produced by the defendant is not, in our opinion, worthy of belief and we, therefore, agree with the Court below and hold that the defendant has failed to prove his case. There remains one point for decision. The appellant claims credit for certain items of expenditure alleged to have been incurred by him. Five such are placed before us for our decision.

The two first are Rs. 940-9-0, funeral expenses of Ganga Pershad, and Rs. 10-11-0 spent on subsequent ceremonies in connection with the death. It is urged that the widow was bound by Hindu Law to perform these ceremonies and as the expense was incurred by the defendant, these sums should be made good by her before the estate is handed over to her. In the *first* place, assuming that the plea is correct, we have practically only the evidence of Anand Behari and his false accounts on which no reliance can be placed to prove the expenditure; *secondly*, the defendant had deliberately kept a

woman out of the estate when he knew full well that she was entitled to possess it. His action has been, in our opinion *mala fide*, throughout. He seized her property and prevented her from receiving its income and doing her duty as a widow in this respect. He spent money as he pleased without consulting her in a matter in which the expenditure was in her discretion. The defendant was not protecting the estate or discharging a burden thereon when he thus took the law into his own hands, and we see no equity in forcing the widow to refund to him sums which he thus voluntarily spent. We decline to allow these claims. The two next claims are for Rs. 120 per annum as the pay of a *karinda* and Rs. 120 per annum as the pay of peons, expenditure incurred in managing the property since the death of Ganga Pershad.

The Court below had already in its decree allowed the defendant 10 per cent. on the income to cover his fees as a *lambardar* and the costs of management. This is a liberal allowance and we decline to allow any more. The fifth item is a sum of Rs. 25. The defendant voluntarily subscribed Rs. 12 to a hospital fund and Rs. 13 towards the cost of an exhibition at Etawah. He seeks to be generous at the expense of the respondent. They were not charges on the estate and he must bear the expense himself, as he did not consult the plaintiff.

We decline to award any of these items. The result, therefore, is that the appeal fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

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RICHARDS, C. J., AND PIGGOTT, J.
Emperor—Applicant

v.

Mohan Lal—Opposite Party.

Criminal Reference No. 181 of 1915, decided on 26th March, 1915, made by the S. J., Bareilly, on 19th February, 1915.

(a) *Criminal P. C.* (5 of 1898), S. 423 (1) (b)—*Sessions Judge in appeal if satisfied should acquit and not refer the case to High Court.*

Where a Sessions Judge sitting in appeal is of opinion that an accused should be acquitted, he ought not to refer the case to the High Court. It is his duty to allow the appeal and acquit the accused. [P. 186, Col. 1 & 2.]

(b) *Criminal P. C.* (5 of 1898), S. 423 (1) (a)—*Sessions Judge in appeal can order commitment after previous conviction.*

Where a Sessions Judge sitting in appeal thinks that the case ought to have been tried by the Court of Sessions, he should himself set aside the conviction and order a commitment under Section 423 (1) (b) of the Code. 15 All. 205 Foll.

(c) *Criminal P. C.*, S. 439 (3)—*Retrial for purpose of enhancing sentence should be rarely ordered.*

The power of ordering a new trial merely for the purpose of enhancing the punishment is a power that ought to be very sparingly exercised.

Asst. Govt. Advocate—for the Crown.

Judgment.—This case comes before us as a reference from the learned Sessions Judge of Bareilly. Four persons, Mohan Lal, Baldeo Prasad, Debi Sahai and Ram Ghulam, were all tried by a Magistrate on charges under Section 408 read with Section 114 of the Indian Penal Code, and convicted. They all appealed to the Sessions Judge. He seems to have been of opinion that the case against Debi Sahai was not proved. He was also of opinion that the punishments awarded to the other three were insufficient. He has submitted the case to this Court with a recommendation that we should acquit Debi Sahai and enhance the sentences passed on the other three. So far as his recommendation that we should acquit Debi Sahai is concerned, it is quite clear that it was his duty to either dismiss or allow the appeal of Debi Sahai. The learned Sessions Judge ought not to have referred the case of Debi Sahai to this Court at all. With regard to his recommendation for enhancement the learned Sessions Judge seems to have overlooked the provision of Section 439 (3) of the Code of Criminal Procedure which is as follows:—"Where the sentence dealt with under this section has been passed by a Magistrate acting otherwise than under Section 34, the Court shall not inflict a greater punishment for the offence which, in the opinion of such Court, the accused has committed than might have been inflicted for such offence by a.....Magistrate of the first Class." The Magistrate of the first Class has given the full amount of imprisonment which he could give under the law. It follows, therefore, that a higher sentence could not be passed without a re-trial. If the learned Sessions Judge thought that the case ought to be re-tried by the Court of Session, he ought himself to have set aside the conviction and ordered a commitment under Section 423 (1) (b). That he has power to do this has been ruled in the

case of *Queen-Empress v. Maula Bakhsh* (1). We think, however, that the power of ordering a new trial merely for the purpose of enhancing the punishment is a power that ought to be very sparingly exercised. We do not for one moment wish to be taken as saying that the offence for which the accused have been found guilty (particularly under the present circumstances), was not a most serious one. Nor do we wish to say that it would not have been better if the accused had been committed in the first instance to the Court of Sessions. At the same time the sentences cannot be said to have been nominal sentences. There is a strong principle that a man ought not to be tried a second time unless there are very grave reasons for so doing.

The only order we feel bound to pass is that the record be returned to the learned Sessions Judge that he may complete the disposal of the appeals. We order accordingly.

Record returned.

(1) (1893) 15 All. 205=1893 A.W.N. 105.

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PIGGOTT, J.

Dharam Singh and another—Applicants

v.

Joti Prasad—Opposite Party.

Criminal Revn. Petn. No. 8 of 1915, decided on 29th March 1915, from an order of the Mag., Saharanpur.

Criminal P. C. (5 of 1898), Ss. 209, 210 and 213—*Magistrate is competent to discharge accused after hearing defence witnesses and holding them reliable and disproving prosecution.*

When a Magistrate has heard the evidence for the prosecution with entire disbelief, where he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* where, after examining certain witnesses named on behalf of the accused, he comes to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution witnesses he is well within his discretion in discharging the accused and not committing him to the Sessions.

[P. 188, Col. 1.]

C. Dillan, Boys and Nihal Chand—for Applicant.

H. Wallach and Satya Chandra Mukerjee—for Opposite Party.

Ryves—for the Crown.

Judgment.—As long ago as the 27th of January 1914 a serious riot, accompanied with loss of life, took place at a certain village in the Saharanpur District. A number

of persons were put on their trial and convicted of offences punishable under Sections 148 and 304-149, Indian Penal Code. They appealed to this Court and their appeals were disposed of by an order dated the 27th July 1914, by which the appeals of three of the appellants were allowed and those of the remaining appellants dismissed, subject to some modification of the sentences passed. In the course of the inquiry and trial ending with the Appellate judgment of this Court above referred to, a question arose as to whether there was not reason to suppose that the persons put on their trial in that case had been acting under the instigation of other and more influential persons, who, though not present at the riot themselves, had been guilty of abetment of the same within the meaning of the Indian Penal Code. An inquiry was ordered against two persons, Rana Dharam Singh and Durga Prasad, and one might have hoped that this inquiry would long since have been terminated in the conviction of these persons, or in their acquittal, or in their final discharge. The proceedings were unfortunately delayed by an application for transfer made to this Court, the groundlessness of which has been sufficiently exposed by the actual result of the subsequent proceedings. This Court having refused to interfere, the inquiry against these two persons came before a joint Magistrate of ability and experience, who had not long previously been exercising the powers of a Sessions Judge. He recorded the evidence for the prosecution, examined the accused persons and at their request, exercised the discretion conferred upon him by Section 212 of the Code of Criminal Procedure to summon and examine some of the witnesses named in the list given to him on behalf of the said accused. As the result of his inquiry he discharged both the accused. An application was thereupon filed in the Court of the District Magistrate of Saharanpur by a gentleman of the name of Rai Bahadur Lala Jyoti Prasad, who appears to have some interest in the success of this prosecution, asking the District Magistrate to exercise the powers conferred upon him by Section 436 of the Code of Criminal Procedure to order Rana Dharam Singh and Durga Prasad to be committed for trial before the Court of Session. The

matter was again brought before this Court on an application for transfer. Unfortunately the proceedings in this Court were delayed by various accidental circumstances, and it became a question whether this proceeding could be allowed to drag its course much longer without scandal to administration of justice. I finally called for the record of the proceedings in the Joint Magistrate's Court and gave notice both to the prosecution and to the defence that I proposed to take the whole matter up in the exercise of the revisional jurisdiction of this Court. I have to-day examined the record, considered the evidence in detail and heard the arguments addressed to me on both sides. There has been some discussion also on a point of law which is supposed to arise with regard to the discretion of a Magistrate in conducting an inquiry preliminary to commitment. The law, so far as this Court is concerned, seems to have been definitely laid down in the case of *Fattu v. Fattu* (1), where some older cases of this Court are referred to and considered. It has been urged upon me in argument that the learned Judges of the Calcutta High Court, as for instance in the case of *Sheobux Ram v. Emperor* (2), have taken a somewhat different view regarding the discretion of a Magistrate under the circumstances stated. One learned Judge of that Court laid it down in effect that a Magistrate conducting such preliminary inquiry had only to consider whether there was evidence against the accused persons upon which a Jury could lawfully convict them of the offence alleged against them, and if he found that this was so, had no discretion but to commit the accused for trial. This does not seem to me to follow from the provisions of Sections 209 or 210 of the Code of Criminal Procedure, and seems scarcely consistent with the provisions of the second clause of Section 213 of the same Code. The Bombay High Court in *In re Bai Parvati* (3) has held in express terms that, where a Committing Magistrate finds that there is no evidence whatever, or that the evidence tendered for the prosecution is totally unworthy of credit, it is his duty under Section 209 of the Criminal Procedure Code to

(1) (1904) 26 All. 564 = 1 A.L.J. 292 = 1904 A.W.N. 125 = 1 Cr. L. J. 519.

(2) (1905) 9 C.W.N. 829 = 2 Cr. L.J. 534.

(3) (1910) 8 I.C. 631 = 35 Bom. 163.

discharge the accused. In my opinion when a Magistrate has heard the evidence for the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when, after examining certain witnesses named on behalf of the accused, he has come to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution witnesses, he is well within his discretion in discharging the accused. The question then before me is merely whether there has been a wrong exercise of this discretion in the present case. By calling up the matter in revision I have virtually taken upon myself the exercise of the discretion conferred by law on a District Magistrate or a Court of Session. My reasons for doing this I have already explained. I think it is expedient that this matter should be disposed of once for all, either by my directing the commitment of Rana Dharam Singh and Durga Prasad to the Court of Session or by an order dismissing the application of Rai Bahadur Lala Joti Prasad against the order of discharge. In my opinion the reasons given by the Magistrate in the present case for discrediting the prosecution evidence are sound and convincing. As regards some of the witnesses, incidents had occurred in the course of the inquiry by which their evidence was thoroughly discredited, and it would have been something of a scandal to the administration of justice to permit the same witnesses to repeat their false evidence, with necessary corrections and amendments, in the presence of the Sessions Court. The witness Harbans was asked in cross examination a question so entirely relevant and proper that, after perusal of his evidence-in-chief, this was the very first question which presented itself to my mind and I enquired whether it had not been put to the witness. After fencing with it for a while, the witness ended by refusing to answer it at all. It would have been most improper to have allowed this witness to appear again as a prosecution witness against these accused persons, and the Joint Magistrate would have exercised a sound discretion in taking immediate notice of the gross contempt of Court committed by him. During the examination of another witness an episode

occurred from which the Joint Magistrate inferred, and in my opinion rightly inferred, that the prosecution witnesses were being improperly coached outside the Court-room with reference to what was going on inside. These are sufficiently weighty circumstances for consideration. Apart from them I am satisfied that the evidence which the Joint Magistrate declined to believe is unworthy of credit. The witnesses are not speaking of anything which actually occurred in their presence. Whether there was or was not a gathering at the building which they speak of as the *zemindars dera* on the night to which their evidence refers, I am confident that these witnesses were not present at that gathering and did not see or hear what they profess to have done. The order of discharge in this case is a very proper one and is not to be interfered with. It may be taken that I have exercised the powers of this Court under Section 526, clause (3), and also under Section 439 of the Code of Criminal Procedure to call up the pending application of Rai Bahadur Lala Joti Prasad from the Court of the District Magistrate of Saharanpur to this Court, and my order there on is that this application be, and it is hereby, dismissed.

Application for prosecution dismissed.

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CHAMIER AND PIGGOTT, JJ.

Sahadeo Gir—Applicant—Petitioner

v.

Deo Dutt Misir and others—Opposite Parties.

Civil Revn. Petn. No. 114 of 1914, decided on 9th March 1915, from an order of the Sub-J., Gorakhpur.

Civil P. C. (5 of 1908), S. 152—Though holding that defendant's mortgage was prior, no mention was made in decree—It was accidental slip or omission and can be corrected.

In a suit for sale on the basis of a mortgage one of the defendants pleaded that he was a prior mortgagee. An issue was struck to that effect and was decided in favour of the defendant. In the operative part of the judgment, however, no mention was made as to the priority of the defendant's claim, and accordingly

there was no mention of it in the decree. After the time for appeal had expired, an application was made for amendment of the decree under Section 152 of the Code of Civil Procedure. The Court refused to go into its merits, holding that Section 152 did not apply.

Held, that this was a clear case of an error arising from an accidental slip or omission and as the Court below had refused to correct the error, the High Court could interfere in revision. [P. 189, C. 1.]

Sital Prasad Ghose and J. N. Chaudhri—for Applicant.

Abdul Ruof—for Opposite Parties.

Judgment.—This is an application in revision brought under peculiar circumstances. The petitioner was a prior mortgagee. He had brought a suit against the mortgagor and the subsequent mortgagees upon his mortgage and had obtained a decree. Later on the subsequent mortgagees brought a suit impleading the mortgagor and the present petitioner, and asked for a decree for sale. The petitioner pleaded his prior mortgage. An issue was expressly struck on the point and was found in the petitioner's favour. The operative portion of the judgment directed that a decree for sale should be prepared in accordance with the provisions of Order XXXIV, Rule 4, of the Code of Civil Procedure, allowing six months for payment. In the absence of any express direction in the judgment that this decree was to be for sale of the property in suit subject to the petitioner's prior mortgage, no order to that effect was embodied in the decree. The decree passed was, therefore, one for sale of the property as it stood, without reference to the petitioner's prior mortgage. That decree was not appealed against, and to this extent the petitioner may have been guilty of laches. When, however, it came to the petitioner's knowledge that the opposite party was seeking to execute that decree as it stood, he went to the Court which passed the same and sought to obtain its amendment. The application with which we are concerned was one presented under Section 152 of the Code of Civil Procedure. The Court below refused to go into the matter on the merits. It held that the case was not one to which the provisions of Section 152 aforesaid applied. We are unable to concur in the reasoning of the learned Judge of the Court below. In our opinion, this was a clear case of an error arising from an accidental slip or omission. The Court should have been

prepared to correct that error, either of its own motion or on the application of any of the parties. There has been a refusal to exercise what in this case was a necessary jurisdiction, and this refusal is based on a misunderstanding of the powers conferred on the Court below by the section aforesaid. We accept this application, and direct that the judgment be amended by the insertion of the express words directing the sale of the property in suit subject to the prior mortgage of this petitioner, and that consequential amendments be made in the preliminary decree for sale, as also in the decree absolute. As we think that the petitioner might have been more watchful over his own interests and should have taken action earlier than he did, we direct that he do bear the costs of the opposite side in the present proceedings both here and in the Court below.

Application granted.

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FULL BENCH.

RICHARDS. C. J., BANERJEE AND
TUDBALL, JJ.

Gaya Din and others—Plaintiffs—
Appellants

v.

Jhuman Lal and others—Defendants—
Respondents.

First Appeal No. 223 of 1913, decided on 9th April 1915, from the decision of the Sub-J., Mainpuri, dated 27th March 1913.

Limitation Act (9 of 1908), Art. 132.—(Per F. B.) Mortgage of 1890 payable in ten yearly instalments—Right to sue for whole in default of one instalment—Deed further provided for interest to remain payable till realization even if suit not filed on default—Suit in 1912 was barred by Art. 132. (Per Banerjee, J. contra)—On true construction money became due after 10 years.

A mortgage-deed executed in 1890 provided that the mortgagors should pay the principal amount secured in ten years by instalments of Rs. 625 yearly together with interest and further provided as follows: "If we (mortgagors) fail to pay the interest aforesaid in any month or the principal by the end of the stipulated period as specified above, or no payment is made in a year, the mortgagee shall, under all these circumstances, be at liberty to realize the entire amount with the interest

aforsaid in a lump sum through Court by means of a suit...If the mortgagee in order to get interest does not bring a suit in default of payment of any instalment and we are unable to pay the money, the interest should continue up to the stipulated period of ten years and also after it up to the date of realization etc." No payment was ever made upon foot of either principal or interest up to the date of the institution of the suit in 1912.

[P. 190, C. 1.]

Held [*Banerji, J.*, dissenting] that the money under the bond "became due" within the meaning of Article 132 of the Limitation Act when the first default was made in 1890 and accordingly the suit was barred by limitation. [P. 192, C. 1.]

Per *Richards, C. J.*—Money under a bond "becomes due" as soon as it is legally recoverable, quite irrespective of when the suit is instituted.

[P. 191, C. 2.]

Reeves v. Butcher, (1891) 2 Q. B. D. 509; 24 Cal. 281 and 20 Mad. 245 Foll. 22 Mad. 20 Ref. and 29 All. 431; 16 All. 371; 30 All. 123; 20 I.C. 933; and 1 Cal. 163 (P. C.) Dist.

Per *Banerji, J.*—Upon a true construction of the bond in this case the money secured by it became due on the expiration of ten years from the date of the bond and the claim was not barred by limitation.

Abdul Raoof and Muhammad Ishaq Khan—for Appellants.

Sunder Lal, B. E. O'Connor, S. C. Banerji, and Situl Prasad Ghose—for Respondents.

Richards, C. J.—This appeal arises out of a suit to enforce payment of a sum of Rs. 10,000, principal and interest alleged to be due on foot of a mortgage, dated the 16th of July 1890, by sale of the mortgaged property. The mortgage-deed provided that the mortgagors should pay the principal amount secured in ten years by instalments of Rs. 625 yearly and that the interest should be paid monthly. There was this further clause: "If we fail to pay the interest aforsaid in any month or the principal by the stipulated period, as specified above, or no payment is made in a year, the mortgagee shall, under all these circumstances, be at liberty to realize the entire amount with the interest aforsaid in a lump sum through Court by means of a suit from the mortgaged and other moveable and immoveable property and the person of us, the executants." Later on the deed has a provision which has been translated as follows:—"If the mortgagee in order to get interest does not bring a suit in default of any instalment and we are unable to pay the money, the interest should continue up to the stipulated period of ten years and also after it up to the date of

realization." This last clause seems to me simply to mean that the mortgaged property should remain and be security for the interest even if no suit was brought to enforce the monthly payment. No payment was ever made upon foot of either principal or interest up to the date of the institution of the present suit on the 12th of June 1912.

The Court below has dismissed the plaintiffs' suit, holding that the claim is barred by limitation. The plaintiffs appeal.

In my opinion the decision of the Court below is correct. It is admitted that the Article of the Limitation Act which applies is Article 132. See the decision of their Lordships of the Privy Council in *Vasudeva Mudaliar v. Srinivasa Pillai* (1). This Article deals with "suits to enforce payment of money charged upon immoveable property." The period of limitation prescribed is 12 years and time begins to run from the date when the money sued for becomes due. No doubt if the mortgagors had fulfilled their contract, the mortgagees would not have been entitled to sue until the expiration of ten years from the date of the mortgage, and in that case the present suit would have been within time. The provision, however, in the deed admittedly entitled the mortgagee to bring a suit to recover principal and interest after the first default, and if it can be said that the money then "became due" the suit is barred by limitation. It is contended on behalf of the appellant that the mortgagees were entitled to sue, or not to sue and that accordingly on the true construction of the mortgage-deed the money did not "become due" until the expiration of ten years from the date of the mortgage. I cannot agree with this contention. It seems to me that money is "due" when it can be legally demanded, and it is admitted in the present case that the money secured by this mortgage could have been legally demanded and recovered after the first default, and had a suit been brought for its recovery by sale of the mortgaged property the defendants could not have pleaded that such a suit was premature. For this there is the high authority of the

(1) (1907) 30 Mad. 426 = 34 I. A. 187 = 17 M.L.J. 444 = 11 C. W. N. 1005 = 9 Bom. L.R. 1104 = 6 C.L.J. 379 (P.C.)

English Court of Appeal in the case of *Reeves v. Butcher* (2). In that case the plaintiff lent money to the defendant under a written agreement for a fixed period of five years "subject to the power to call in the same at an earlier period in the events hereinafter mentioned." The defendant agreed to pay interest quarterly and the plaintiff agreed not to call in the money for five years if the defendant should regularly pay interest. It was further provided that if the defendant should make default in payment of any quarterly payment of interest for 21 days, the plaintiff might call in the principal. No interest was ever paid. The plaintiff commenced his action within six years from the end of the period of five years. It was held that time began to run against the plaintiff from the earliest time at which the action could have been brought, that is to say, 21 days after the first instalment of interest became due. Lindley, L. J., said: "I am of opinion that we cannot differ from the judgment below without altering the law. The agreement is one reasonably easy to be understood. It provides for a loan for five years, subject to a provision that if default is made in punctual payment of interest, the principal shall be recoverable at once. Now, the Statute of Limitations (21 Jac. 1, c. 16) enacts that such actions as are therein mentioned, including 'all actions of debt grounded upon any lending or contract without specialty,' shall be brought 'within six years next after the cause of such action or suit, and not after.' This expression, 'cause of action,' has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* (3), decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the Statute runs from the earliest time at which an action could be brought."

Fry, L. J. said: "We have not to determine whether the defence here set up is handsome or conscientious, but whether it is good at law—and I am of opinion that it

is. The agreement contains a stipulation that the lender shall not call in the principal sum for a period of five years, if the borrower should so long live, and should duly and regularly pay the interest. This implies a contract by the borrower that the principal debt should be paid to once on the death of the borrower, or on default in payment of interest. The subsequent provisos imply a contract by the lender not to enforce payment after the death of the borrower until the expiration of a six months' notice, and a contract not to enforce payment of the capital for default in payment of interest until 21 days after such default, thus giving the borrower further time. Subject to these stipulations, the implied contract to pay the principal remained in force. The principal, therefore, became payable 21 days after the first quarterly instalment of interest became due, and from that time the Statute of Limitations began to run. If authority is wanted, *Hemp v. Garland* (3) is in point." Lopez, L. J., said: "The defendant alleges that the cause of action arose more than six years before the action was commenced, and that the action is barred by the Statute of Limitations. Now, when first had the plaintiff a cause of action? When default was made for 21 days in payment of an instalment of interest. *Hemp v. Garland* (3) is in point. It is said that this case is not good law, and that it has not been referred to for many years. I think that it has not been referred to because it has been acquiesced in, and it does not appear that it has ever been questioned." It seems to me that this case is the clearest authority (if authority were needed) that money "becomes due" as soon as it is legally recoverable, quite irrespective of when the suit was instituted.

This view was taken in the case of *Sitab Chand Nahar v. Hyder Malla* (4) and in the case of *Perumal Ayyan v. Alagirisami Bhagavathar* (5).

A somewhat contrary view was taken in the case of *Nettakaruppa Goundan v. Kumarasami Goundan* (6). In this last case, however, the clause in the mortgage-deed was as follows: "In default of paying on the above dates, I shall pay the said sum with interest at Rs. 15 per cent. per

(2) (1891) 2 Q. B. D. 509=65 L. T. 329=39 W. R. 626=60 L. J. Q. B. 619.

(3) (1879) 4 Q. B. 519=12 L. J. Q. B. 134=7 Jur. 802=3 C. & D. 402=114 E. R. 994=62 R. R. 422.

(4) (1897) 24 Cal. 281=1 C. W. N. 229.

(5) (1897) 20 Mad. 245=7 M. L. J. 222.

(6) (1899) 22 Mad. 20=8 M. L. J. 167.

annum, from the date of the bond, irrespective of the above due date, *whenever you make the demand.*" The Court seems to have thought that the money did not become due on default unless a demand was made. It is unnecessary to express any opinion as to whether or not the learned Judges were correct in their construction of the deed in question, because there are no similar words in the deed in the present suit.

A number of cases have been cited on behalf of the appellant, including the cases of the *Maharaja of Benares v. Nand Ram* (7), *Shankar Prasad v. Jalpa Prasad* (8), and *Ajuthia v. Kunjal* (9). All these cases dealt with the construction of Article 75 of the Limitation Act which contains no reference to the money "becoming due," and in my opinion these cases have no bearing on the question which we have to consider in the present appeal [see also *Amolak Chand v. Baij Nath* (10).] Article 75 is the Article applicable to quite a different suit from the present. The learned Advocate for the appellants also referred to a dictum of their Lordships of the Privy Council in the case of *Juneswar Das v. Mahabeer Singh* (11). The facts of that case were quite different and their Lordships expressly state that it was unnecessary to decide the question to which the dictum refers. Their Lordships have, moreover, in the recent case to which I have referred decided that Article 132 is the Article which applies to a suit on a simple mortgage to enforce payment of money charged on immoveable property. I am clearly of opinion that in the present case the money "became due" within the meaning of that expression in the Article of limitation when the first default was made and that accordingly the suit is barred by limitation. I would dismiss the appeal.

Banerji, J.—The only question in this appeal is whether the plaintiffs' claim, which is one to enforce payment of the amount due on a simple mortgage by sale

of the mortgaged property, is barred by limitation. The mortgage bond is dated the 16th of July 1890 and the time fixed for re-payment is ten years. Except for another provision in the bond, to which I shall presently refer, the amount secured by it was re-payable on 16th July 1900 and as the present suit was instituted on the 12th of June 1912, it would be within time under Article 132 of Schedule I of the Limitation Act, which has been held by their Lordships of the Privy Council to be applicable to a suit of this kind. The defendants, however, rely on the following provision of the bond and urge that the amount of the mortgage became due when default was made in the payment of the first instalment and as more than 12 years have elapsed since the date of default, the claim is time barred. The provision is this:—"We shall pay Rs. 625 yearly and we shall pay the interest on the said amount monthly at the rate of 8 annas per month. If we fail to pay the interest aforesaid in any month or the principal by the end of the stipulated period as specified above, or no payment is made in a year, the mortgagee shall, under all these circumstances, be at liberty to realize the entire amount with the interest aforesaid in a lump sum through Court by means of a suit from the mortgaged and other moveable and immoveable property and the persons of us, the executants." Had this clause stood alone, it might perhaps be said, on the authority of the English and other cases cited on behalf of the respondents, that the plaintiffs were bound to sue when default was first made in the payment of the instalment fixed in the bond. The document, however, goes on to provide that "if the mortgagees in order to get interest do not bring a suit in default of payment of any instalment and we be unable to pay the money, the interest should continue up to the stipulated period of ten years and also after it up-to-date of realization." This clause, in my opinion, means that the mortgagee is competent to wait for the full period of ten years stipulated in the bond and it is not obligatory on him to call in the money on the occurrence of a default in the payment of the instalment. The bond, in its earlier provisions, made the mortgaged property security both for principal and interest, and this clause would be wholly unnecessary and redundant if the meaning of it was only to make the pro-

(7) (1907) 29 All. 431 = A.W.N. (1907) 139; 4 A.L.J. 336.

(8) (1894) 16 All. 371 = A.W.N. (1894) 115.

(9) (1908) 30 All. 123 = A.W.N. (1908) 35; 5 A.L.J. 72.

(10) (1913) 20 I.C. 933 = 35 All. 455.

(11) (1875-76) 1 Cal. 163 = 25 W.R. 84 = 3 I.A. 1 = 3 Sar. P.C.J. 58; 3 Suth. P.C.J. 222 (P.O.)

erty security for interest or to provide for payment of interest. It says nothing about the security and it, in my opinion, clearly intends that the mortgagee might, if he so chose, wait for the full term of ten years and if he did so, interest would run till date of actual payment. This provision in the bond gives full power to the mortgagee not to enforce his right to claim the entire amount of the mortgage on the happening of a default but to wait till the expiry of the stipulated period of ten years. It is true that under Article 132 time begins to run from the date when the money becomes due, but that date depends upon the terms of each document and a true construction of those terms. In my judgment, in view of the clause in the bond in suit to which I have referred, the money secured by the bond did not become due until the expiration of ten years from the date of the bond. Where under the terms of the document the creditor is authorized to wait for the full period stipulated for re-payment, the money cannot be held to have become due within the meaning of Article 132 until the expiry of that period. The first clause as to payment of the whole amount on the occurrence of a default was clearly inserted in the document for the benefit of the creditor and as he was expressly authorized not to take advantage of the clause I am unable to hold that he was bound to sue when default was made. Any other view would, as observed in *Maharaja of Benares v. Nand Ram* (7), be "very unfortunate." "It would be to punish a creditor for forbearance shown to his debtor, and compel him to press his demands at the earliest opportunity and insist upon speedy and full satisfaction of his claim." The question in that case was of the applicability of Article 75, which, of course, does not govern this case, but the principle of the ruling applies. A similar view was held by Edge, C. J., and Blair, J., in *Shankar Prasad v. Jalpa Prasad* (8), which was a case of execution of a decree. The decree in that case provided that the amount of it should be paid by eight instalments and that in case of default and non-payment of any instalment, the plaintiff had power to realize in one lump sum the entire decretal money payable up to that time by executing the decree. It was held upon a construction of the decree that the "decree-holder on the happening of

any default might, if he wished, execute the decree for all the decretal money then unpaid, but that it was not the intention that on the happening of a default the decree-holder should be bound to execute the decree once and for all." In *Juneswar Das v. Mahabeer Singh* (11), their Lordships of the Privy Council expressed a similar opinion. That was a suit to recover the amount of a hypothecation bond in which the borrower engaged to re-pay the amount with interest on a day named, with a condition that in the event of the hypothecated lands being sold in execution of a decree before the day fixed for repayment the lender should be at liberty at once to sue for the recovery of the debt. It was contended that the plaintiffs' cause of action arose on the 18th of May 1865, when the lands pledged were sold in execution and that the suit having been brought after six years from that date was time-barred. With reference to this contention their Lordships observed: "Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this would have been barred if the limitation of six years under clause 16 had been applicable to it. They think upon the construction of this bond there would be good reason for holding that the cause of action arose within six years of the commencement of the suit." Their Lordships thus held that limitation would begin to run from the date fixed for payment and that the cause of action arose, that is to say, the money became due on that date and not on the date on which the hypothecated property was sold in execution. It is true that their Lordships said that it was not necessary to decide the point in the view which they took of the period of limitation applicable to the case before them, but an expression of opinion by their Lordships is entitled to the greatest weight and ought to guide the Courts in this country. Considerable reliance was placed on behalf of the respondents on the cases of *Sitab Chand Nahar v. Hyder Malla* (4) and *Perumal Ayyan v. Alagirisami Bhagavathar* (5). In neither of those cases was there a clause in the bond similar to the one in this case which expressly empowered the creditor to wait for the full term of the mortgage. Those cases, therefore, are, in my opinion, no

authority on the question before us. The decision of that question depends upon the true construction of the terms of the bond and the intention of the parties as gathered from the bond. I am of opinion that upon a true construction of the bond in this case the money secured by it became due on the expiration of ten years from the date of the bond and that the claim is not barred by limitation. I would allow the appeal, set aside the decree of the Court below and remand the case to that Court for trial on the merits.

Tudball, J.—I concur with the learned Chief Justice that the present suit is barred by limitation. The matter to my mind is a simple one. Article 132 clearly applies and under that Article time began to run from the date on which the money became due. To find out the date on which the money became due one has to examine the conditions laid down in the bond. They are simple and run as follows: "It is covenanted that we shall pay the said amount of principal within ten years, that is, we shall pay Re. 625 annually, and we shall pay the interest on the said amount monthly at the rate of 8 annas per month. If we fail to pay the interest aforesaid in any month or the principal in the stipulated period as specified above, or no payment is made in a year, the mortgagee shall under all these circumstances be at liberty to realize the entire amount with the interest aforesaid in a lump sum through Court by means of a suit from the mortgaged and other moveable and immoveable property, and the persons of us, the executants. We or our heirs or representatives shall have no objection or excuse in any way." Then comes a clause on which considerable stress has been laid on behalf of the appellants but which in my opinion is not of the slightest assistance to them. Correctly translated that clause runs as follows:—"If the mortgagee in his desire for interest does not bring a suit on any default of ours, and we are unable to pay the money, the interest shall continue up to the stipulated period of 10 years and also after that up to the date of realization." It is an admitted fact that the mortgagors failed to make any payments of interest within the first year after the execution of the deed, and no instalment of principal or interest has ever been paid. Under the terms of the bond immediately on the first default

occurring the mortgagor was clearly liable to pay the whole sum to the mortgagee. In other words, the money became due from the mortgagor to the mortgagee on the occasion of the first default. I fail to see how the last clause, which I have mentioned above, helps the appellants in any way. It seems to me that this clause was simply put into the document in order to make it quite clear that the interest should continue to run in spite of no suit being brought not only up to the expiry of the 10 years but also up to the date of realisation. It was simply put in to make it clear that interest would not cease to run after the expiry of 10 years. The mortgagee on the occurrence of, the first default was fully entitled to demand his money and the mortgagor could not have met him with the plea that his demand was premature. There is no question of 'waiver,' for no waiver has been alleged, much less proved. Paragraph 3 of the plaint is practically a repudiation of any waiver. In my opinion under the clear terms of this bond the money "became due" in the year 1890 and the present suit was many years beyond time. I would, therefore, dismiss the appeal.

By the Court.—The order of the Court is that the appeal be dismissed with costs, including in this Court fees on the higher scale.

Appeal dismissed.

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CHAMIER, J.

Raghubir and others—Plaintiffs-Appellants

v.

Tulshi Ram and others—Defendants-Respondents.

Second Appeal No. 578 of 1914, decided on 16th April 1915, from the decision of the Sub-J., Farrukhabad, dated 2nd February 1914.

U.P. Land Revenue Act (3 of 1901), Ss. 106, 110, 111 and 112—Ss. 110, 111 and 112 are applicable to imperfect partition—Therefore question of title though not raised becomes res judicata—Civil P.C. (5 of 1908), S. 11.

Ss. 110, 111, 112 of the Land Revenue Act do apply to imperfect partitions and, therefore, the rule to the effect that a party to a partition proceeding who has had the opportunity of pleading a question of title and has not availed

himself of that opportunity, cannot maintain a suit in the Civil Court for the relief which he might have claimed in the partition proceedings, does apply to proceedings taken for imperfect partition. 29 All. 604 Ref. and 1899 A.W.N. 190 Dist. [P. 195, Col. 2.]

B. N. Vyas—for Appellants.

A. P. Dube—for Respondents.

Judgment.—This appeal arises out of a suit brought by the appellants for a declaration, that they are entitled to a one-sixth share in a certain *patti*. The prayer for relief is not worded in this way but this is the meaning of it. The lower Appellate Court has declined to make such a declaration, but has made a declaration of another description intended to limit the rights of the respondents in a certain way. On the facts as found by the lower Appellate Court the appellants are entitled to the share which they claimed and the only question is whether they are entitled to obtain a declaration to that effect in the Civil Court. It appears that in the *khewat* of 1305 *Fasli* the plaintiffs were shown as entitled to a three-eighteenth share and the respondent Tulshi Ram was shown as entitled to an eight-eighteenth share. At the recent Settlement by some mistake a record was prepared showing that the appellants are entitled to no more than a one-sixteenth share while the respondent Tulshi Ram is shown as entitled to an eight-sixteenth share. Thus the appellants' share has been reduced and the respondent Tulshi Ram's share has been increased. The only defence with which I am concerned now is that the appellants might and ought to have put forward their claim in certain partition proceedings and as they did not do so, they are not entitled to maintain the present suit. It is a fact that partition proceedings were instituted to which the appellants were made parties, the usual proclamation was issued and a date was fixed by which those concerned were required to state their objections, if any, to the partition. The appellants had an opportunity of putting forward their objections, but did not do so. They may have been misled by an order of another Revenue Court passed on an application for the correction of the *khewat*. That Court was not satisfied that the record was incorrect and rejected the present appellants' application to have it altered, saying that their remedy lay in the Civil Court. The fact that another Revenue

Court in another proceeding suggested that the appellants should proceed by way of a suit in a Civil Court, did not relieve the appellants from the necessity of putting forward their claim in the partition proceeding. It was contended in the lower Appellate Court, and it has been contended before me, that the rule laid down in a number of cases in this Court, including that of *Nathi Mal v. Tej Singh* (1), to the effect that a party to a partition proceeding, who has had the opportunity of pleading a question of title and has not availed himself of that opportunity, cannot maintain a suit in the Civil Court for the relief which he might have claimed in the partition proceedings, does not apply to the case of an application for imperfect partition. Reliance is placed on the decision of this Court in *Aisha Begam v. Abdul-lah Khan* (2). In that case Knox and Aikman, J.J., dealing with a plea similar to that put forward by the respondent Tulshi Ram in the present case, said "the answer to this plea is that while it is true that on an application for perfect partition a case may arise on which, under Sections 112 and 113 of the N.W. P. Land Revenue Act, there can be a decision which would have the effect of finally determining the conflicting claims, the same result cannot take place in a case of imperfect partition. In the case of an imperfect partition any objection, would, with reference to the last clause of Section 134 of the N.-W. P. Land Revenue Act, put the applicant for partition out of Court." Without expressing any opinion as to the correctness of the construction placed in that case on the proviso to Section 134 of the Act of 1873, I think it is sufficient to say that that proviso finds no place in the present Land Revenue Act (Local Act III of 1901). Section 106 of the present Act provides that the procedure prescribed in Chapter VII of the Act shall be followed in all partitions, whether perfect or imperfect, except where it is otherwise expressly declared. The sections with which we are concerned in the present case are Sections 110, 111 and 112. It is not declared that these sections do not apply to imperfect partitions. I must, therefore, hold that they do apply to

(1) (1907) 23 All. 604=4 A.L.J. 578=1907 A.W.N. 190.

(2) (1899) A.W.N. 190.

imperfect partitions and that the rule laid down by so many decisions of this Court, with reference to objections which might have but have not been put forward in the partition proceedings, applies under the present Act to proceedings taken for imperfect partition as well as to proceedings taken for perfect partition. For these reasons I am of opinion that the first relief claimed by the appellants in the present suit cannot be granted to them by the Civil Court, I, therefore, dismiss this appeal with costs.

Appeal dismissed.

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PIGGOTT AND CHAMIER, JJ.

Jwala Pershad Sahu—Plaintiff—Appellant

v.

Bigalram Mandwari—Defendant—Respondent.

Civil Revn. Appln. No. 1 of 1915, decided on 24th March 1915, from the decree of the Dist. J., Gorakhpur, dated 4th September 1914.

Civil P. C. (5 of 1908), O. 9, R. 8, O. 17, R. 2, and O. 11, R. 21—Plaintiff failing to produce account books—Order not referring to documents disclosed in pleadings or affidavits—Suit dismissed for default—Application lies to restore suit—Civil P. C. O. 11, R. 21.

The plaintiff was required to produce some books of account on a fixed date but the order did not refer to any documents disclosed in pleadings or affidavits. The plaintiff being absent on that day, the Court dismissed the suit.

Held, that an application to restore the suit was maintainable as the order dismissing the suit was not under O. 11, R. 21 but under O. 9, R. 8 and O. 17, R. 2. [P. 196 C. 2.]

(b) *Civil P. C. (5 of 1908), O. 11, R. 21—R. 21 requires that the documents must be referred to in pleadings or affidavits.*

A suit can be dismissed under Order XI, Rule 21, for failure to comply with an order for discovery or inspection of documents only when the documents are referred to in the pleadings or affidavits. [P. 195, C. 2.]

M. L. Agarwala—for Appellant.

Tej Bahadur Sapru and Parmeshwar Dayal for Iswar Saran—for Respondent.

Judgment.—This is an application for revision of an order of the District Judge of Gorakhpur dismissing an appeal against an order of the Additional Munsif of Doria disallowing an application for resto-

ration of a case which had been dismissed. It appears that the plaintiff was required by the Court to produce some books of account. He failed to comply with the order of the Court and on March the 23rd, 1914, the date ultimately fixed for the production of the accounts, he was absent. The Munsif recorded an order which concluded as follows: "As the plaintiff is absent, order—the suit is dismissed with costs. The defendant shall get his costs from the plaintiff." It seems to us that there can be no doubt that the Munsif was acting under Order XVII, Rule 2, read with Order IX, Rule 8, Civil Procedure Code, and that he dismissed the suit because the plaintiff did not appear when the suit was called on for hearing and not because the plaintiff had failed to produce his books. The plaintiff applied for restoration of the case under Order IX, Rule 9, Civil Procedure Code. The Munsif dismissed the application, because in his opinion the suit had been dismissed under Order XI, Rule 21, therefore, no application for restoration was maintainable, and also because the plaintiff had failed to satisfy him that he had sufficient cause for his non-appearance. The plaintiff then appealed to the District Judge, who dismissed the appeal saying: "The application was rightly rejected because the suit had been dismissed under the provisions of Order XI, Rule 21, of the Code of Civil Procedure." It seems to us that both the District Judge and the Munsif were under a misconception when they said that the suit had been dismissed under Order XI, Rule 21. It is not a case of a party having failed to comply with an order for discovery or inspection of documents, for such an order could only refer to documents the existence of which was referred to in the pleadings or affidavits. The result is that through a misconception the District Judge has failed to consider whether the plaintiff was entitled to present an application for restoration of the case. It is clear that the learned Judge was of opinion that if the plaintiff objected to the order dismissing his suit, he should have appealed under Order XLIII, Rule 1 (f). In short, the District Judge has, through a misconception, failed to exercise his jurisdiction. He ought to have heard the appeal on the merits. We allow this application, set aside the order

of the District Judge and direct that the record be returned to him in order that he may dispose of the plaintiff's appeal according to law. Costs of this application will be costs in the cause.

Application allowed.

A. I. R. 1915 Allahabad 197

CHAMBER AND PIGGOTT, JJ.

Maharaj Narain Sheopuri and another
—Defendants-Appellants

v.

Shahsi, Shekhareshwar Roy—Plaintiff-Respondent.

First Appeal No. 135 of 1914, decided on 8th March 1915, from an order of the Dist. J., Benares.

(a) *Specific Relief Act* (1 of 1872), S. 42—*Suit for declaration of being an Honorary Secretary—Burden is on plaintiff to show that suit is for legal right under S. 42.*

Where the plaintiff sues for a declaration that he is the Honorary Secretary to an association and that a resolution passed at a meeting of the association dismissing him from the secretaryship is null and void :

Held, that he is bound to satisfy the Court that the suit is one concerning the right to an office within the meaning of Section 9 of the Civil Procedure Code, and also that what he is enforcing in the suit is his right to a certain 'legal character' within the meaning of Section 42 of the Specific Relief Act. [P. 197, C. 2.]

(b) *Civil P. C.* (5 of 1908), S. 9—*Claim for Honorary Secretaryship where services voluntary and gratuitous is not one for office.*

Where the plaintiff's services to an association are voluntary and gratuitous and where there is no question of any contract between him and its Board of Trustees, the Civil Court has no jurisdiction to entertain the suit.

[P. 197, C. 2.]

S. C. Chowdhri and S. C. Banerjee—for Appellant.

A. E. Ryves, Harendra Krishna Mukerji and A. C. Mitra—for Respondent.

Judgment.—In this case the plaintiff, Raja Sashi Sekareswar Roy, Rai Bahadur, describes himself as the Chief Secretary of the Board of Trustees, otherwise known as the Pratidhi Sabha, of an Association known as the Sri Bharat Dharma Mahamandal, registered under Act XXI of 1860. He complains in effect that the two defendants, who are members of the said Association, are seeking to

remove him from the post of Chief Secretary and have endeavoured to do so by measures contrary to the rules of the Association itself. He asks for a declaration that a circular convening a meeting to be held on May 12th, 1912, was "invalid and inoperative under the rules or constitution of the said Sri Bharat Dharma Mahamandal," and that the meeting held in consequence of this notice and the resolutions passed at the said meeting are "null and void."

The first Court held that the dispute was not one cognizable by the Civil Courts and that the plaintiff had no *locus standi* under S. 42 of the Specific Relief Act to ask for a declaration; it dismissed the suit accordingly. The learned District Judge in appeal has reversed this finding and remanded the suit for trial on the merits. The appeal before us is by the defendants against this order of remand.

I think the first Court was substantially right and that the learned District Judge has taken too narrow a view of the question in issue. In order to succeed, the plaintiff has to satisfy the Court both that the suit is one concerning the right to an office, within the meaning of Section 9 of the Code of Civil Procedure, and also that what he is enforcing in this suit is his right to a certain "legal character" within the meaning of S. 42 of the Specific Relief Act (No. 1 of 1877). Of the reported cases to which we were referred in argument, the one most nearly in point is that of *Channu Dat Vyas v. Babu Nandan* (1). It may be that the fact that a plaintiff is claiming some position to which no remuneration attaches is not always decisive; but in the present case I think it is so. If the plaintiff were the paid Secretary of the Board of Trustees he would have certain rights founded upon contract, and he could claim the enforcement of the rules of the Society or Association as they existed at the time of his appointment, in so far as those rules formed part of the essential conditions subject to which he accepted his employment. As a matter of fact the plaintiff's services are voluntary and gratuitous; there is no question of any contract between him and the Board of Trustees. The latter have a perfect right to entrust the duties of Honorary Secretary to their body to such person or per-

sons, willing to undertake the same, as they may from time to time approve. It would be idle for the Civil Courts to enter upon an investigation of the rules of this particular Association governing the appointment of Honorary Secretaries, when those rules themselves could be altered at any moment by the Board of Trustees, and there is no enforceable contract in existence which could bind the Trustees to abide by the rules in existence at the time of the plaintiff's appointment in their subsequent dealings with him. That this is no merely conjectural argument is sufficiently shown by the fact that, at the hearing of this appeal, we have been handed two different sets of rules, the appellant putting in a book dated "January 1911" and the respondents one of 1913. The point really lies in a nutshell. The plaintiff either does or does not possess the confidence and support of a majority of the Board of Trustees. In the former case no such machinations as are alleged in the plaint could prevent the said Board from continuing to use his services as their Honorary Secretary, in the latter case no decree which any Civil Court could pass on a suit like the present could prevent the Board of Trustees from dispensing with the plaintiff's services and employing some one else.

I would set aside the order of the lower Appellate Court and restore the decree of the Court of first instance dismissing this suit.

Chamier, J.—I agree.

By the Court.—The order and decree of the lower Appellate Court are set aside and the decree of the Court of first instance dismissing the suit is restored. The defendants will get their costs in all Courts.

Appeal allowed.

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FULL BENCH.

KNOX, RAFIQUE AND PIGGOTT, JJ.
In the matter of *Maharaj Somesah Dut*.

Civil Misc. Appeal No. 620 of 1914, decided on 9th February 1915, on reference by the Board of Revenue.

Stamp Act (2 of 1839), S. 4—Gift deed and maintenance deed executed by two brothers reciprocally form one transaction and come under S. 4.

Where the two brothers T and S, to settle a dispute between them, executed two instruments,

one a deed of gift whereby T conveyed all his property to S and another by which S undertook to maintain T during his life. [P. 199, C. 1.]

Held, that the two instruments together were one transaction within the meaning of the word "settlement" in section 4 of the Stamp Act and were chargeable with the stamp duty in accordance with that section. [P. 199, C. 1.]

Ryves—for the Crown.

Judgment.—On the 15th of May 1914 two brothers, Tirbhuwan Dut Sukul and Maharaj Somesah Dut Sukul, executed each of them a document. The deed of gift executed by Tirbhuwan Dut Sukul has been endorsed by us as Exhibit A and the deed executed by Maharaj Somesah Dut Sukul has been marked as Exhibit B and will be alluded to in the course of this judgment in those terms.

Deed A is said to bear a stamp of Rs. 1,125. Deed B bears a stamp of Rs. 10. When the two documents were taken to the Registration Office, deed B was impounded and on its coming before the Deputy Commissioner, Sitapur, that officer came to the conclusion that the stamp required was a stamp of Rs. 360. He also considered that a penalty of Rs. 700 should be paid by Maharaj Somesah Dut. Somesah Dut appealed from the decision of the Deputy Commissioner to the Board of Revenue.

The Board of Revenue were unable to come to any conclusion as to what was the right and proper stamp to impose and have referred the matter to this Court under section 57 of the Indian Stamp Act.

We have had both deeds read to us and we have had the assistance of the learned Government Advocate in considering the matter. Deed B is very artistically drawn up, the language in which it is expressed is of such a dubious kind that it has not been easy to come to a decision on the question referred.

Briefly stated the case is as follows:—Tirbhuwan Dut Sukul in consideration of love and affection and the promise to be maintained by his brother executed a deed of gift over his immoveable and moveable property. It is this deed which has been stamped with a stamp of rupees 1,125. Maharaj Somesah Dut Sukul, as said above on the same date, executed deed B. In that deed he promises that during the life-time of Pandit Tirbhuwan Dut he will pay whatever expenses may be required on account of food, conveyance, travelling for pilgrimage, charity, clothing, etc., provided

that Tirbhuwan Dut lives permanently in the ancestral house or in the house in which he may with his consent put him up and that have no concern with the quarrelsome persons who created disunion between *Pandit* Tirbhuwan Dut and himself.

There is a further clause which lays down the maximum amount per mensem which Tirbhuwan Dut may expend for charity and railway journey, etc. Up to this maximum Maharaj Someshar Dut Sukul agrees to pay. There is also a clause regarding money "required for expenses" and how that is to be assessed, no definite sum is given. Certain property which is detailed in the deed is hypothecated and the deed says that that property will be responsible for the expenses of *Pandit* Tirbhuwan Dut wherever and to whomsoever it is transferred. The property scheduled differs, save and except one house, from the property scheduled in deed A.

We have tried to see whether deed B can come within any of the deeds set out in Schedule I of the Indian Stamp Act, but we cannot find any Article which exactly covers the deed.

Looking broadly to the two documents we are satisfied that the deed B is one which comes within Section 4 of the Indian Stamp Act. The transaction before the parties may fairly be said to come within the word "settlement." The two instruments were intended by the parties to be employed in completing this one transaction and the principal instrument as determined by the parties has been stamped and more than sufficiently stamped.

Deed B has in our opinion been properly stamped and more than sufficiently stamped in accordance with the provisions of Section 4 of the Act.

We have not overlooked the fact that in dealing with an Act of this kind we have to construe the Act in favour of the subject.

Let a copy of this our judgment be sent to the Chief Controlling Revenue Authority i.e., to the Board of Revenue, as our opinion on the matter referred to us.

Reference answered.

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CHAMIER AND PIGGOTT, JJ.

Utma Kuar—Applicant-Appellant

v.

Bhagwanta Kuar—Opposite Party-Respondent.

First Appeal No. 22 of 1915, decided on 10th May 1915, from an order of the Dist. J., Azamgarh, dated 7th November 1914.

Guardians and Wards Act (8 of 1890), Ss. 12 and 25—*Proceedings of appointment of guardian of person not complete unless possession delivered—Court competent to take action under S. 12.*

Where a person has been appointed guardian of the person of a minor, the proceedings cannot be regarded as complete until the guardian has obtained effective possession of the person of the ward. If the guardian is not in such possession, the Court should take action under S. 12 of the *Guardians and Wards Act* (VIII of 1890) to place the minor in his possession. [Case-law referred.]

[P. 200, C. 2.]

Sital Prasad Ghose—for Appellant.

Hamilton—for Respondent.

Judgment.—This is an appeal by a guardian lawfully appointed under the *Guardians and Wards Act*, VIII of 1890. The facts are peculiar. *Musammatt Utma Kuar* applied to the District Judge of Azamgarh to be appointed guardian of the person and property of her minor daughter, Chandra Kuar. She stated in her application that the minor had been removed from her care and custody by her married daughter, *Musammatt Bhagwanta Kuar*, sister of the said minor; but she did not ask the Court to take action under S. 12 of Act VIII of 1890. Notice was issued to *Musammatt Bhagwanta Kuar*, and certain matters having been inquired into by the Court, an order was passed on the 26th of August 1914 appointing *Musammatt Utma Kuar* guardian of the person of her minor daughter, and a formal certificate of guardianship was issued to her dated 31st August 1914. On 15th September 1914 *Musammatt Utma Kuar* presented an application to the Court, alleging that she was still unable to obtain possession of the person of the minor and asking the Court to take steps to cause the minor to be placed in her charge. This application was rejected by the learned District Judge, on the ground that he had no jurisdiction to take any action in the matter under the provisions of Act VIII of 1890 and that *Musammatt Utma Kuar's* only remedy was

by way of a regular suit. According to the principles laid down by this Court in *Sham Lal v. Bindo* (1), with which we entirely concur, no regular suit for the purpose suggested could have been brought. We are satisfied that the minor Chandra Kuar became a ward of the Court from the date of the order appointing *Musammât Utma Kuar* to be her guardian and on general principles the District Judge became thereby empowered to enforce, for the benefit of the minor, all the provisions contained in the Guardians and Wards Act, VIII of 1890. One of these provisions is to be found in Section 24, which lays down that a guardian of the person of a ward is charged with the custody of the ward and must look to his (or her) support, health and education. *Musammât Utma Kuar* was asking the Court to assist her to perform the duties imposed upon her by the section above quoted, and we are quite satisfied, on general principles alone, that she was entitled to the assistance of the Court. The matter has been argued before us on various technical grounds. An objection has been taken on behalf of the respondent that the order of the District Judge, whether right or wrong, is one against which no appeal lies under the provisions of Section 47 of Act VIII of 1890. It has also been argued that whatever powers the Court possesses by way of controlling the possession of the person of a minor ward, its jurisdiction is limited by Sections 12 and 25 of the Act itself. Neither of these sections, it has been contended, applies to the present case. Over the question whether an appeal lies or not we are disposed to pass lightly. If we are satisfied that the learned District Judge has in fact rejected the application of *Musammât Utma Kuar* upon wrong grounds, then he has refused to exercise jurisdiction in a matter in which it was incumbent upon him to exercise such jurisdiction. If we cannot interfere by way of appeal, we can interfere by way of revision, as laid down by Section 48 of Act VIII of 1890. With regard to Sections 12 and 25 of the said Act, we think it possible that either or both of these sections might be applied. On the whole, if the matter is to be dealt with as a technical question

with reference strictly to the wording of Act VIII of 1890, the preferable view seems to us to be that the Court below could have taken action, and was bound to take action, under Section 12 of the Act. In view of the provisions of Section 24 of the Act to which we have already referred, the appointment of *Musammât Utma Kuar* to the guardianship of the person of this minor ward could not be regarded as complete until she had obtained effective possession of the person of the ward, so as to enable her to discharge the duties laid upon her by that section. It is quite true that Section 12 of the Act provides for the temporary custody of a minor in the *interim* between application being made to the Court and the final conclusion of the necessary proceedings for the appointment of a guardian of the person of the minor, but as we have already pointed out those proceedings are really not complete until the guardian of the ward has obtained the custody of the minor. We think, therefore, that it was still open to the Court below to take action under section 12 of the Act. An alternative view would be for the Court to proceed on the assumption that what ought to have been done had been done, and that the custody of the minor had technically been made over to the lawfully appointed guardian from the date of such appointment, in this view the provisions of Section 25 would apply. From any point of view we are satisfied that the Court below was wrong and its order cannot be sustained. We set it aside and remand the case to the Court below with directions to re-admit the same to the file of pending applications and dispose of it according to law. Costs of this appeal will be costs in the cause and can be dealt with by the Court below when finally disposing of the matter.

Case remanded.

(1) (1904) 26 All, 594=1 A.L.J., 266=1904 A.W.N. 135.

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RICHARDS, C. J. AND PIGGOTT, J.

Bharat Indu and others—Plaintiffs—Appellants

v.

Gobardhan Das and others—Defendants—Respondents.

First Appeal No. 279 of 1913, decided on 17th March 1915, from the decree of the Sub-J., Bareilly, dated 1st May 1913.

(a) *Transfer of Property Act (4 of 1882), S. 60—Attachment of equity of redemption after compromise decree on mortgage was passed—Auction purchaser has to pay decretal amount for redemption.*

H executed a mortgage in favour of *G* in 1898. *B* had a decree against *H* in execution of which he attached the equity of redemption of *H* in that mortgage in 1907 and purchased it himself in 1911. In the meantime a suit had been brought under the foot of the mortgage of 1898 and a compromise decree was passed in 1910:

Held, that in a redemption suit brought by *B* against *G*, the former was bound to pay the amount decreed in favour of the mortgagee under the decree of 1910 and that the attachment of the equity of redemption in 1907 had no effect in determining the amount which *B* had to pay to the mortgagee at the time of the redemption. [P. 203, C. 1.]

(b) *Civil P. C. (5 of 1908), O. 21, R. 46 (semble) Attachment does not create an estate—It merely puts it in custody of Court.*

Semble:—An attachment of a property does not confer an estate. It merely operates to keep the property in the custody of the law until such time as a sale can be had to satisfy the decree by virtue of which the attachment is issued. [P. 203, C. 1.]

S. C. Banerji—for Appellants.

L. M. Banerji—for Respondents.

Judgment.—This appeal arises out of a suit in which the plaintiffs claimed to redeem a mortgage, dated the 18th of July 1898, and made by Hakim Wilayet Ali in favour of one Maharaj Gobardhan Das, the principal amount borrowed being the sum of Rs. 6,000. There is no dispute between the parties that the plaintiffs are entitled to redeem the mortgage. The contest is that the plaintiffs say that they are entitled to redeem upon payment of the principal sum of Rs. 6,000, whilst on the other hand the defendants say that the amount due upon their mortgage has been duly and finally ascertained by a decree of this Court dated the 1st of August 1910. This decree ascertains the amount

due for principal, interest and costs at the sum of Rs. 20,270-11-0 with future interest at 1 per cent. per mensem. The defendants contend that the plaintiffs cannot redeem without paying this sum. The Court below has decided in favour of the defendants.

The facts are a little complicated, but may nevertheless be shortly stated. The plaintiffs had another mortgage against Hakim Wilayet Ali affecting other property than that now in suit. They sued on foot of this mortgage, obtained a decree, sold the property and having exhausted their rights against the mortgage security, they applied for a decree under Section 90 of the Transfer of Property Act, so as to enable them to follow the other property of the judgment-debtor for the purpose of realising a large sum still unpaid. This decree they duly obtained, and in execution thereof they attached the property which it is now sought to redeem; and later on, on the 21st of March 1911 and the 21st of August 1911, purchased it themselves. We may mention that the attachment was made on the 12th of November 1907, although the actual sale did not take place until the dates just mentioned. In the meantime a suit on foot of the mortgage, which it is now sought to redeem, was instituted in February 1909. It is now necessary for a moment to refer to the particular nature of the mortgage. On the face of it, it is a possessory mortgage. It expressly provides that the possession should go against interest, that the mortgagee should not be accountable for rents and profits, and on the other hand the mortgagor should not be liable for interest. Simultaneously, however, two other documents, namely a *patta* and a *kabuliat*, were executed and registered. These documents provided that the mortgagor should remain in possession as tenant to the mortgagee, paying a yearly rent which in fact was equal to 12 per cent. per annum simple interest on the principal sum of Rs. 6,000. The mortgage was recited and there was a provision that rent in arrear should bear interest at the rate of 1 per cent. per mensem. In the plaint the mortgagee set forth that the mortgagors had only paid 1½ years' interest, and accordingly they claimed that the full principal sum was due together with compound interest at the rate of 12 per cent.

per annum after giving credit for the 1½ years in which the rent was paid. The defence was that there was no liability in respect of interest, that the mortgagee could only sue for rent under the lease, and that this rent was in no way a charge on the property, that rent could only be recovered in the Revenue Court, and that consequently the plaintiff was only entitled to sell the property to realise the principal sum of Rs. 6,000. The mortgagees on the other hand urged the Court to hold that the mortgage, *patta* and *kabuliat* all represented a single transaction and that the true intention was that, if the rent was not paid, it should be a charge on the property realisable by sale in an ordinary mortgage suit. In short, the contention was that the transaction should be regarded as a simple mortgage with interest at 12 per cent. per annum. The Court of first instance decided in favour of the defendants and held that the plaintiffs were only entitled to the principal money secured. The plaintiffs appealed, again urging that on the proper construction of the three documents they were entitled to realise the interest as well as the principal. The appeal was compromised on the 1st of August 1910. The plaintiffs were given a decree for the amount we have already mentioned, which was practically all they claimed. It is said that some small sums, amounting to a few hundred rupees, were given up in respect of costs, but in all other respects the plaintiffs' appeal succeeded as the result of the so-called compromise. The appellants here contend that, as against them, this compromise decree must be deemed fraudulent and collusive. We shall assume for a moment (without deciding) that the appellants have a right to challenge the validity of this decree on the ground that it was fraudulent. Our attention has not been called to any direct evidence of fraud. So far as we can see, Hakim Wilayat Ali Khan fought the case as best he could at least up to the time of the compromise decree. The plaintiffs say that the very fact that he made this compromise decree, which was tantamount to confessing judgment, at a time when he knew that they were creditors for a large amount, on the face of it stamps the transaction as a fraud as against them. No doubt a good deal might be said for this

proposition, if it was absolutely clear that Hakim Wilayat Ali Khan could have succeeded in having the appeal of the mortgagees dismissed, and that he and his advisers knew that they had only to prosecute the appeal to attain this result. If we were now called upon to decide between the mortgagor and mortgagee, we should hold that the mortgagee was only entitled to sell the property to realise the principal sum of Rs. 6,000, but we think that at the time a formidable argument could have been put forward in respect of the mortgagees' contention that they were entitled to interest as well as principal, based upon the decision of this Court in First Appeal No. 98 of 1907, judgment in which case was delivered on the 22nd of December 1908. That was a case rather the converse of the present. There had been a mortgage, on the face of it usufructuary. Simultaneously a lease was made to the mortgagor at a rent equivalent to 6 per cent. per annum on the principal money (admittedly far below the actual profits of the property). The mortgagor made default in payment of rent and was ejected. Thereupon the mortgagee went into possession and remained in possession taking all the rents and profits. In a suit for redemption the mortgagor contended that, inasmuch as the mortgagee had received profits which it was never intended that he should receive, he ought to give an account of so much of the profits as were in excess of the stipulated rent as against the mortgage-debt. The mortgagee, on the other hand, contended that he was entitled to rely on the terms of the mortgage-deed which expressly stated that possession was to go against interest and that he was not to be accountable for profits. A Bench of this Court decided in favour of the plaintiffs holding that the mortgagee was bound to give an account of the excess of profits. We merely mention this case as showing that it might very reasonably have been argued that the principle would equally apply to the case where the mortgagor remained in possession of the mortgaged property without paying the rent which he had covenanted to pay. We mean by this that the fact that the mortgagor allowed a decree to be made against him for the alleged interest as well as the principal does not necessarily mean that it

was a fraudulent transaction. It is consistent with his admitting a debt which he believed that he was liable for and against which there was no use fighting (paper torn) was before the mortgagee's legal rights he evidently thought he could recover the interest when he left the mortgagor in possession without paying rent. In our opinion, if it was necessary for the appellants in order to sustain their present contention to show that the compromise decree was fraudulent, they have failed to do so.

We have already mentioned that the plaintiffs-appellants purchased the present property on the 21st of March 1911 and the 21st of August of the same year. If they are in the same position as any ordinary auction-purchaser who had attended and purchased at the auction sale, then it would seem that they are bound by the decree which was binding between the mortgagors and the mortgagees. In other words, they are only entitled to redeem the property upon payment of the amount ascertained to be due by the decree of the 1st of August 1910.

The appellants, however, contend that by virtue of their attachment, dated the 12th of November 1907, they were entitled under Section 91 of the Transfer of Property Act to redeem the mortgage. That section provides that certain persons, and amongst others a judgment-creditor of the mortgagor who has obtained execution by attachment of a mortgagor's interest in the property, are entitled to redeem or institute a suit for redemption of the mortgaged property. The answer to this contention is that the plaintiffs at the time they instituted the present suit had long ceased to occupy the position of "creditors attaching the mortgagor's interest" in the property. The property had been sold in pursuance of the attachment and they themselves became the purchasers of the equity of redemption, and stood in his shoes. Attachment does not confer an estate. It merely operates to keep the property in the custody of the law until such time as a sale can be had to satisfy the decree (or decrees) by virtue of which the attachment issued. It seems to us, therefore, that the plaintiffs by purchasing the equity of redemption could place themselves in no higher posi-

tion than if that property had been purchased by a third party, and that the mere fact that at some time prior to the sale they had got an attachment of the mortgagor's property, gave them no right at the time they instituted the present suit.

In this view we think that the decree of the Court below is correct and ought to be affirmed. We may point out that we do not affirm the finding upon which the decision in the Court below proceeds. We may also point out that the decision of this Court in First Appeal No. 98 of 1907 was reversed by their Lordships of the Privy Council in the case of *Abdulla Khan v. Basharat Hussain* (1). We dismiss the appeal with costs. We extend the time for payment to three months from this date. *Appeal dismissed.*

(1) (1913) 17 I.C. 737—35 All. 48=40 I.A. 81 (P.C.)

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PIGGOTT, J.

Panna Lal—Defendant-Appellant

v.

Rameshar Sahai—Plaintiff-Respondent.

Second Appeal No. 1000 of 1913, decided on 17th April 1915, from the decision of the Addl. Sub-J., Moradabad, dated 21st July, 1913.

(a) *Adverse possession*—Assertion of adverse title by mortgagee as such does not extinguish right of redemption—Mortgagor and mortgagee.

A mortgagor's right to redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties means act of parties to the mortgage transaction. No assertion of adverse title on the part of a mortgagee during the continuance of a mortgage can set time running against the mortgagor so as to deprive the latter of his right to redeem within a period of sixty years. [P. 206, C. 1 & 2.]

(b) *Limitation Act* (9 of 1908), Arts. 134 and 148—Mortgagee's vendee's title is not adverse from date of sale—Redemption suit lies within 60 years.

If a mortgagee sells the mortgaged property out and out to a third person, the possession of the vendee does not become adverse against the owner of the equity of redemption from the date of the sale, and a suit for redemption would lie under Article 148 of the Limitation Act.

[P. 205, C. 1 & 2.]

S. C. Banerji and *Gokul Prasad*—for Appellant.

Sunder Lal and *Gulzari Lal*—for Respondent.

Judgment.—I have stated the facts of this case at some length in my remand

order of July the 3rd, 1914. The finding of the lower Appellate Court on the remanded issue puts it beyond question that the plaintiff is the successor-in-interest of the original mortgagor. The essential facts may, therefore, be recapitulated. On the 24th January 1867 the predecessor-in-title of the present plaintiff mortgaged by conditional sale a house in the town of Chandausi to one Hazari Lal and put him in possession. On June the 15th, 1873, Hazari Lal sold this shop to Panna Lal, the defendant-appellant. There had been no foreclosure of the mortgage by conditional sale. In the deed of June the 5th, 1873, Hazari Lal recited that the shop in question had come into his possession under a mortgage by conditional sale, but that he was now in possession as a full owner. He did not say that he had foreclosed the mortgage. He undoubtedly purported to sell the shop itself and not any mortgagee rights in respect of the same. The lower Appellate Court has found that the vendee, Panna Lal, did not in fact believe that his vendor had power to convey an absolute interest in the shop.

I must pause to note that this finding is challenged in argument on behalf of the appellant. It is contended that it was not fairly open to the lower Appellate Court to arrive at this finding. The learned Subordinate Judge held that the very recital in the sale-deed of 1873 was calculated to put the vendee on his guard, that the vendee made no sort or kind of inquiry but went into the transaction with eyes shut. He has, however, gone further than this. Relying partly on the wording of the document and partly on certain facts and circumstances regarding the location of the shop, residence of the parties and so on, and partly on certain oral evidence, he has come to the conclusion that, when the vendee chose to accept his vendor's assertion that he was in full proprietary possession of the shop, he had good reason for believing that this assertion was not true, and did not in fact believe it to be true. Sitting as a Court of second appeal, I am not prepared to hold that the lower Appellate Court had not before it materials on which it was entitled to arrive at the above finding.

If this finding cannot be disturbed, it seems to me that, according to a long course of decisions in this Court, this suit

for redemption must succeed and the plea of limitation set up by the defendant-appellant must be overruled. I refer to *Bhagwan Sahai v. Bhagwan Din* (1), *Kampta Prasad v. Bakar Ali* (2) and *Husaini Khanam v. Husain Khan* (3). It has been contended on behalf of the appellant that these decisions are inconsistent with later opinion in this Court itself. On this point reference is made to the case of *Behari Lal v. Muhammad Muttaki* (4). I have also been referred to a case decided elsewhere by one of the learned Judges of this Court, namely, *Dal Singh v. Gur Prasad* (5), and it has been contended that the same learned Judge has recently re-affirmed the view taken by him in Oudh in an unreported decision in Second Appeal No. 547 of 1914 pronounced by him on March 11, 1915. Further, I have been asked to consider that the current of decisions of this Court with regard to the application of Article 134 of the first Schedule to the Limitation Act (IX of 1908) is inconsistent with the opinions pronounced by other High Courts. There would certainly appear to be a clear consensus of opinion to the contrary in the Bombay High Court, reference being made to *Baiva Khan Daud Khan v. Bhiki Sabza* (6), *Yesu Ramji Kalnath v. Balkrishna Lakshman* (7), *Pandu v. Vithu* (8) and *Ramchandra v. Sheikh Mohidin* (9). Other cases to which I have been referred in argument may be found reported as *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur* (10) and *Chettokulam Prasanna Venkatachala Reddiar v. Collector of Trichinopoly* (11). Finally it was suggested that the latest decision of this Court relied upon on behalf of the plaintiff-respondent, namely, that in *Husaini Khanam v. Husain Khan* (3), proceeds upon a view as to the effect of a mortgage by a trustee or a mortgagee amounting to a "purchase" within the

(1) [1886] 9 All. 97=1886 A.W.N. 303.

(2) [1881] A.W.N. 122.

(3) [1907] 29 All. 471=4 A.L.J. 375=1907 A.W.N. 133.

(4) [1898] 20 All. 482=1898 A.W.N. 123.

(5) [1909] 2 I.C. 250=12 O.C. 84.

(6) [1885] 9 Bom. 475.

(7) [1891] 15 Bom. 583.

(8) [1895] 19 Bom. 140.

(9) [1899] 23 Bom. 614.

(10) [1905] 2 C. L. J. 546.

(11) A.I.R. 1914 Mad. 708=24 I.C. 369.

meaning of Article 134 of the first Schedule to the Limitation Act, or I should say to a transfer of the property in question within the meaning of the same Article as it appears in Act IX of 1908, and is inconsistent with the pronouncement of their Lordships of the Privy Council in *Abhiram Goswami Mohunt v. Shyama Charan Nandi* (12).

With regard to a good deal of this argument I think it is sufficient to say at present that, although the Article of the Limitation Act in question refers to transfers both by trustees and by mortgagees, it may well be that by reason of the provisions of the Transfer of Property Act (IV of 1882) different considerations may govern the application of this Article in cases where a transfer has been made by a trustee or by a mortgagee respectively. On this point I desire to add a few words presently. I mention it merely for the sake of noting that the Calcutta and Madras cases to which I have referred above were both cases of transfer by trustees. For the same reason I find nothing in the decision of *Behari Lal v. Muhammad Muttaki* (4) to conflict with the course of decisions of this Court governing transfers by mortgagees. All the older cases of this Court relied upon by the present respondent are not even referred to, much less overruled, by the Full Bench which decided *Behari Lal v. Muhammad Muttaki* (4). It seems to me, therefore, that I might content myself with saying that I have before me at least three reported cases, each decided by a Bench of this Court, in favour of the respondent's contention that the present suit is not, upon the findings arrived at by the lower Court, barred by limitation. Sitting as a single Judge of this Court I am bound by the decisions above referred to.

I desire, however, as the matter has been fully argued before me, to place on record my opinion that the decision which I propose to pass may be supported independently of the authorities above referred to, by a line of reasoning somewhat different to that which has been followed by other learned Judges of this Court. The suit as brought is against the legal representatives of the original mortgagee and against Panna Lal as transferee of the mortgagee rights. It is on the face of it a suit for redemption

of a mortgage and governed by the provisions of Art. 148 of the first Schedule to the Indian Limitation Act (IX of 1908). Such a suit is undoubtedly maintainable within the prescribed period of sixty years, against either a mortgagee or any transferee of mortgagee rights. When, therefore, the defendant Panna Lal pleads that the suit as against him is barred by limitation by reason of the provisions of Article 134 of the first Schedule to the Limitation Act, it seems to me that his pleading requires some further analysis. He must be taken to plead that he is not a transferee of the mortgagee rights, but a person who has somehow come into possession of the property in suit, and that his possession can only be disturbed by means of a suit for ejectment. Now it is quite conceivable that, in a case like the present, the original mortgagor (or his successor-in-interest) might have gone to the original mortgagee (or his successors) and redeemed the mortgage out of Court, receiving in return a full discharge of the mortgage-debt and the mortgagee's claims. If, after having done this, he found himself obstructed by the defendant Panna Lal in his attempt to enter into possession of the mortgaged property, any suit which he might bring against Panna Lal would clearly be a suit for recovery of possession of the kind contemplated by Article 134 already mentioned. Whatever view might be taken as to the meaning of that Article, it could not be denied that the suit was governed by it. In the present case the controversy in reality is whether Article 134 applies at all. The answer to this question must depend on whether Panna Lal is a transferee of the mortgagee rights or is simply a person who has come into possession of the property in suit under a title adverse to that of the original mortgagor.

I venture to suggest that on this view of the case three possible contentions are open: (1) It might be said that the Court will not go beyond the terms of Panna Lal's document of title. He holds what purports to be a sale-deed of the property out and out. Therefore, he cannot be treated as a mere transferee of the mortgagee rights. The suit as against him would, therefore, not be a suit for redemption at all, but a suit for recovery of possession. (2) It might be contended

that the Court will not go behind the actual status of the parties to the transaction embodied in the sale-deed of June 5th, 1873 ; or the legal effect of the said deed. The vendor under that deed purported to convey something which he did not possess, namely, full proprietary rights in respect of the house in suit. He did, however, possess some rights in respect of the house, namely, mortgagee rights. The legal effect of the deed, therefore, would be to convey to the transferee whatever rights Hazari Lal possessed at the time of the transfer. Those rights being rights of a mortgagee, Panna Lal became in law a transferee of the mortgagee rights. A suit for redemption will, therefore, lie as against Panna Lal and the period of limitation for such a suit is sixty years. (3) The case may be looked at from the point of view which has been actually taken in the reported decisions of this Court which I am prepared to follow. If it had been found that Panna Lal entered into possession of the house in dispute under the sale-deed of June 5th, 1873, in the honest belief that he had obtained full proprietary rights in the said house by reason of that deed, and with the obvious and avowed intention to exercise the rights of a full proprietor, he would, under this view of the case, be entitled, as the learned Judges of this Court said, to the "protection" of Article 134 aforesaid. In effect, as it seems to me, this view of the case involves holding that Panna Lal's possession became adverse against the owner of the equity of redemption from the date of the sale in his favour.

On either of the last two views the suit as brought is within time. I do not desire to discuss the matter further, beyond remarking that, if the learned Judges who have accepted the first of the views set forth above with regard to the operation of Article 134 of the first Schedule to the Indian Limitation Act are right in the interpretation which they have put on the words of that Article, considered by themselves, it seems to me that a conflict of principles becomes involved between the provisions of that Article and those of S. 60 of the Transfer of Property Act (IV of 1882). A mortgagor's right to redeem subsists until it has been extinguished by act of parties or order of a Court. Act of parties must mean act of the parties to the

mortgage transaction. I take it to be settled law that no assertion of adverse title on the part of a mortgagee during the continuance of a mortgage could set time running against the mortgagor so as to deprive the latter of his right to redeem within a period of sixty years. The sale by Hazari Lal in favour of Panna Lal was, so far as the vendor was concerned, simply an assertion of adverse title as against the mortgagor. This, I take it, could not operate so as to extinguish his right to redeem, or set time running against the mortgagor. If anything can be held to have set time running against him, it must be Panna Lal's entry into possession under the terms of the sale-deed in his favour. Now assuming for the sake of argument that the present suit had been brought within twelve years of the sale of June the 5th, 1873, it is worth while to consider what sort of suit the mortgagor would have been bound to bring. If he had sued Panna Lal for ejectment as a trespasser he would most undoubtedly have been met by a plea that if Panna Lal took nothing else under this sale-deed he had at least acquired Hazari Lal's rights as a mortgagee and that the suit against him should be one for redemption and not for ejectment. Yet if the view which seems to have been taken by the Bombay High Court regarding the operation of Article 134 to the first Schedule of the Limitation Act is correct, it would seem to follow that, if the mortgagee in possession chose, even on the very day after entering into possession, to execute a deed purporting to sell the property itself, and not his mortgagee rights therein, to a third party, he could thereby compel the mortgagor to sue for redemption within twelve years of the sale, or to lose his rights by operation of the law of limitation. I find it very difficult to believe that this is either the intention of the Legislature or the effect of the provisions of the law which I have been considering. The result is that I dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

A I.R. 1915 Allahabad 207

RICHARDS, C.J., AND BANERJEE, J.

Renka and another—Defendants—Appellants

v.

Bhola Nath—(Plaintiff) and others (Defendants)—Respondents.

First Appeal No. 148 of 1913, decided on 13th January 1915, from a decree of the Addl. Sub-J., Aligarh, dated 25th March 1913.

(a) *Hindu Law—Widow—She can retain possession or give free to others for her lifetime her husband's property*

A Hindu widow is entitled to remain in possession of her husband's estate during her life-time and she is not liable to account to any one. She is also entitled to give the property to any one she likes to enure so long as she lives, and she need ask for no rent or other compensation for what she has done. [P. 207, C. 2.]

(b) *Hindu Law—Reversioner—He can sue for declaration that widow's alienations are not binding beyond her life-time.*

But where she alienates or deals with the property to the prejudice of the reversioners in a way not authorized by law, the reversioners are entitled to bring a suit for declaration that the act of the widow shall not prejudice the reversioners. [P. 207, C. 2.]

Sundar Lal and Gulzari Lal—for Appellant.

B. E. O'Connor and Shiam Krishna Dar—for Respondents.

Judgment.—In the suit out of which this appeal arises the plaintiff is the alleged reversioner to the estate of one Sewa Ram, upon the death of his widow, *Musammatt Renka*, the defendant of the first party. The defendants of the second party are alleged to be the nephews of the *Musammatt* on whom she has conferred certain benefits as tenants. The defendant of the third party is a lessee from the defendant of the first party. The defendants of the fourth party are other reversioners, who apparently do not join in the suit. The claim seems to us a most extraordinary one. The plaintiff alleges that a large amount of property has been given to *Jwala Prasad* and his brother as their agricultural holding at a very low rent. It is also alleged that the lease granted by the *Musammatt* is at a low rent and that a premium was taken. Paragraph 9 states that Rs. 600 or Rs. 700 per annum would be quite sufficient for the expenses of the *Musammatt* and that the rest of the income of the pro-

perty should be accumulated. The plaintiff then prays that he himself should be appointed manager during the life-time of the widow, but failing this, the Court should appoint some other person as Receiver; that the lease in favour of the defendant No. 3 should be declared absolutely null and void; that failing this, the plaintiff may be declared entitled to the property comprised in the lease by way of pre-emption; and lastly, that an injunction should be granted against the defendants.

The Court below has made a decree appointing a Receiver over the property. In our opinion the plaintiff has entirely misconceived his rights and the Court below has granted him relief to which he is in no way entitled. A Hindu widow is entitled to remain in possession of her husband's estate during her life-time and she is not liable to account to any one. Of course, she can be restrained from committing wilful waste where it is clearly and distinctly proved that she has been guilty of such action. A Hindu widow is entitled to give the property to anyone she likes to enure so long as she lives, and she need ask for no rent or other compensation for what she has done. She is clearly entitled to grant a lease and to take a premium provided that that lease is not to last longer than the term of her own life. If a Hindu widow alienates or deals with the property to the prejudice of the reversioners in a way not authorized by law, the reversioners are entitled to bring a suit for a declaration that the acts of the widow shall not prejudice the reversioners. In our opinion in the present case no acts of any kind were proved which would in any way justify the Court in taking away the life-estate of the widow and appointing a Receiver. The widow is entitled to spend as she thinks best the entire income of the estate during her life-time.

We must set aside the decree of the Court below and dismiss the plaintiff's suit with costs in all Courts. If the Receiver has taken possession, he should forthwith file and verify his final account in the Court below and when the same has been accepted by the Court below he will be at once discharged.

Objections have been filed by the respondent upon which there was a deficiency

oy in Court-fee which has not been made good though time has been allowed. These objections are, therefore, rejected with costs.

Appeal allowed.

A.I.R. 1915 Allahabad 208 (1)

PIGGOTT, J.

Mukhtar Ahmad and another—Petitioners

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 144 of 1915, decided on 24th March 1915, from the order of the S. J., Saharanpur.

Penal Code (45 of 1860), Ss. 323 and 332—Accused causing hurt to Excise Inspector and constable making illegal search is not guilty under S. 332 but under S. 323.

An Excise Inspector in searching the house of the applicant on the suspicion that he might find there cocaine committed a number of irregularities in conducting this search. He had no warrant authorizing him to make the search. He brought with him only one search witness and directed a constable to scale the outer wall of the house. The accused caused hurt to the Inspector and the constables;

Held, that the Inspector and the constables were not acting in the discharge of their duties as public servants; and that, therefore, the accused were not guilty under Section 332 but only under Section 323 of the Penal Code.

[P. 208, C. 2.]

G. P. Boys—for Petitioners.

R. Malcolmson—for the Crown.

Judgment.—Mukhtar Ahmad and Amir Ahmad have been convicted by a Magistrate on the charge of having caused hurt to an Excise Inspector, one Mr. D. D. C. Das, and certain constables in the discharge of their duties as public servants, and have been sentenced to imprisonment and fine. The conviction and the sentences have been affirmed by the Sessions Judge on appeal. It seems to me that the Courts below have assumed, but cannot be said to have judicially determined, that the persons who were hurt were acting at the time in the discharge of their duties as public servants. They have dealt with the plea of private defence set up on behalf of the accused persons, and have excluded that plea by reason of the provisions of Section 99 of the Indian Penal Code. This finding implies that the Excise Inspector and the constables were resisted at a time when they, being public servants, were acting in good faith under colour of their office. That is not the same thing

as a finding that they were acting in the discharge of their duties as public servants. The distinction was pointed out by a Bench of this Court in *Queen-Empress v. Dalip* (1). So far as my examination of the record goes, I do not find myself able to arrive at the conclusion that the Excise Inspector and the constables were acting in the discharge of their duties as public servants. Mr. Das, who was engaged in searching the house of Mukhtar Ahmad, accused, on suspicion that he might find there cocaine, committed a number of irregularities in conducting this search. He had no warrant authorising him to make this search; he brought with him only one search witness (Section 103 of the Code of Criminal Procedure), and nothing in Sections 102/48 of the same Code justified him in directing a constable to scale the outer wall and effect a burglarious entry into the house. Following the precedent set by the reported decision of this Court, which I have already quoted, I set aside the conviction of Mukhtar Ahmad and Amir Ahmad under Section 332 of the Indian Penal Code and in lieu thereof convict them of the offence of causing hurt under Section 323 of the same Code. I reduce the sentence to one of imprisonment for such period as they may have already undergone, together with a fine of Rs. 15 each. Any fine in excess of this amount which has been paid by the applicants will be refunded. The accused need not surrender and their bail-bonds are discharged.

Order modified.

(1) (1896) 18 All. 246=1896 A.W.N. 48.

A.I.R. 1915 Allahabad 208 (2)

RICHARDS, C. J., AND BANERJI, J.

Raghunath Das—Defendant-Appellant

v.

Kishen Lal and others—Plaintiffs-Respondents.

First Appeal No. 263 of 1913, decided on 22nd February 1915, from the decision of the Dist. J., Meerut, dated 11th June 1913.

Hindu Law—Adoption—Adoption of sister's son invalid without custom.

In the absence of a special custom, the adoption of a sister's son is invalid according to Hindu Law.

B. E. O'Connor and S. C. Banerji—for Appellant.

Hamilton, Moti Lal Nehru, S. N. Sen and Avadh Bihari Lal—for Respondents.

Judgment.—This appeal arises out of a suit brought under Section 92 of the Code of Civil Procedure. The allegations in the plaint were that Lala Shib Lal had by Will, dated the 18th of September 1911, and also by another deed executed during his life-time, created a trust of certain property, that Raghu Nath Das in collusion with Nathu Mal and two other trustees had taken possession of the trust property and misappropriated the same and converted it to their own use. The defence of Raghu Nath was that he was the adopted son of Shib Lal, that the family was a joint family, that the property was ancestral and that Shib Lal had no power to create the trust (Raghu Nath himself brought the suit out of which the connected Appeal No. 265 of 1913 arises). Nathu Mal put in no written statement. The Court below has found that Raghu Nath and Shib Lal were separate at the time of Shib Lal's death. It also found that the trust was validly created and that a breach of trust was committed by some of the trustees and, amongst others, by Nathu Mal. Nathu Mal did not appeal against this decree by which he was ordered to render accounts. The suit brought by Raghu Nath was of course also dismissed, both suits being tried together. It has not been seriously contended that Shib Lal did not know and approve of the contents of his Will, or that the same was not duly executed by him. The evidence on the point is overwhelming and we entirely agree with the decision of the Court below. As to whether the property was ancestral, the Court below has found that Shib Lal was the sister's son of Bansidhar who was the original owner and from whom the property is said to have descended. Shib Lal was not the natural son of Bansidhar, and accordingly the property would not be ancestral in his hands unless he was the validly adopted son of Bansidhar. We see no reason whatever to differ from the view taken by the Court below on the evidence that Shib Lal was the sister's son of Bansidhar. In the absence of a special custom (which would require to be proved), the adoption of a sister's son is invalid according to Hindu Law. The property was not, therefore, ancestral in the hands of

Shib Lal. In addition to this, there is the clearest admission under the hand of Raghu Nath Das himself that he and Shib Lal had separated prior to the death of the latter. The result is that the decree of the Court below is correct. We accordingly dismiss the appeal with costs, including in this Court fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 209

PIGGOTT, J.

Gaya Prasad—Plaintiff—Appellant

v.

Sarfazar Chaudhri—Defendant—Respondent.

Second Appeal No. 982 of 1914, decided on 12th June 1915, from the decision of the Dist. J., Gorakhpur, dated 5th February 1914.

Specific Relief Act (1 of 1877), S. 41—Discretion to impose condition—Minor's suit for setting aside mortgage must be decreed without condition of returning consideration.

The discretion conferred upon the Court by Section 41 of the Specific Relief Act must be so interpreted and exercised as only to impose upon a plaintiff seeking relief by way of cancellation of an instrument such conditions as the law would impose upon him if the position of the parties were reversed and he were the defendant in a suit brought to enforce the instrument according to its terms.

Where the plaintiff brought a suit for setting aside a mortgage-deed executed by him while he was a minor and his mother, who was his certificated guardian, and a decree was passed conditional on his paying the full consideration of the deed in suit.

Held, that as a minor's contract was void the plaintiff's suit should have been decreed as brought.

Parmeshwar Dayal for Iswar Saran—
for Appellant.

Aga Haidar—for Respondent.

Judgment.—On the 25th of February 1909 the plaintiff, Gaya Prasad, being at that time just over 18 years of age, executed in favour of the defendant, Sarfaraz Chaudhri, a mortgage-deed for Rs. 349.13-6, hypothecating a 6-pie *zemindari* share of his own in village Lohraula. Out of the consideration only Rs. 56 was paid in cash at registration, and the balance was said to represent principal and interest on two older bonds executed by Gaya Prasad. As a matter of fact the two older bonds in question, one for Rs. 99 and the other for

Rs. 81, were produced and apparently purported to have been executed jointly by Gaya Prasad and his mother. It has been found that Gaya Prasad's mother had obtained a certificate of guardianship under the Guardians and Wards Act prior to the date of the execution of the mortgage-deed in suit. Under the law, therefore, Gaya Prasad was a minor on the 25th of February 1909. He brought the present suit for a declaration that the document in question is null and void and not binding on the plaintiff and of no effect as regards the property therein hypothecated. The first Court decreed the claim; but, acting under the discretion conferred by Section 41 of the Specific Relief Act I of 1877, made this decree subject to payment by the plaintiff of the sum of Rs. 56, found to have been paid at the time of registration. Both parties appealed to the District Judge. There had been allegations of fraud on both sides. The plaintiff on the one hand denied that any consideration had passed, and over and above pleading his minority alleged that he had been induced to execute the mortgage-deed in suit by fraud; while the defendant alleged that he had been deceived by the plaintiff and that he knew nothing about the certificate of guardianship but believed the plaintiff to be of full age, as in fact he would have been but for the existence of that certificate. The learned District Judge has found that there was constructive fraud on the part of the plaintiff, in that he was bound to have informed the defendant, Sarfaraz Chaudhri, of the fact of his minority but did not do so. He has not found that there was any actual false representation on the part of the plaintiff in regard to his age, nor does he purport in any way to apply the principle of estoppel so as to debar the plaintiff from asserting that he was in fact a minor on the date of the execution of the mortgage-deed. He has nevertheless passed a decree to the effect that the plaintiff do pay Rs. 349-13-6, the full consideration for the deed in suit, with Rs. 108-2-0 interest, and the costs incurred by the defendant in both Courts. The decree does not provide for the event of this payment being made, unless such provision is considered to be implied from the words: "The decree of lower Court be modified and a conditional decree be passed." No doubt the learned District Judge had sufficient reason for feeling

certain that the plaintiff will in no case make the payment in question. In the event of payment not being made, the suit for cancellation of the mortgage-deed was to stand dismissed with costs in both Courts. Against this decree the plaintiff appeals.

He contends that there is no legal basis for a finding that the consideration for the mortgage-deed in suit had been paid in full, and further that the suit should in any case be decreed. The case-law on the subject seems to me in a somewhat unsatisfactory condition. The later law on the subject is all based on the decision of their Lordships of the Privy Council in *Mohori Bibi v. Dharmodas Ghose* (1). It was there laid down in the plainest terms that a mortgage made by a minor is void. The head-note* represents their Lordships as further deciding that a money-lender who has advanced money to a minor on the security of a mortgage is not entitled to re-payment of the money on a decree being made declaring the mortgage invalid. As a matter of fact their Lordships refer to the discretion vested in the Courts by Section 41 of the Specific Relief Act, without definitely deciding whether or not it would be a reasonable exercise of that discretion to refuse to declare a document void, which was really void in law, unless and until some payment were first made by the plaintiff. They content themselves with holding that on the facts of the case before them the Courts below had exercised a wise discretion in refusing to direct any such payment to be made. In *Kamta Prasad v. Sheo Gopal Lal* (2), a suit very similar to the present, in which the cancellation of a mortgage-deed executed by a minor had been unconditionally decreed by the Court below in spite of a finding that a sum of over Rs. 500 had been received by the plaintiff, the decision of the Court below was affirmed by a Bench of this Court. According to the head-note the case would be absolutely decisive on the question now before me; but it would seem from the body of the judgment that the learned Judges did not desire to commit themselves to any positive decision as to the limits of the discretion

* See 30 C. 539—Ed.

(1) (1903) 30 Cal. 539=30 I.A. 114=7 C.W.N. 441 (P.C.)

(2) (1904) 26 All. 342=1904 A.W.N. 41.

exercisable under S. 41 of the Specific Relief Act, in cases where cancellation of a deed is sought on the ground of minority. In *Jagar Nath Singh v. Lalta Prasad* (3) the question was as to the recovery of possession over land which had been conveyed by a deed of sale executed by a minor. The two learned Judges who heard that case differed as to the facts; but the learned Judge who was of opinion that the equities of the case were in favour of the vendees was prepared to make a decree in favour of the plaintiff subject to re-payment of the sale price. There seems to me in any case a distinction between a case for recovery of possession and a suit like the present, which is in reality a mere suit that a document which is void in law may be declared to be so. I was also referred to the case of *Kanhai Lal v. Babu Ram* (4), in which a suit upon a promissory note executed by a minor was dismissed. The question of the possible application of section 41 of the Specific Relief Act was referred to in the judgment but did not require to be determined. On the authorities it appears beyond question that, if the defendant were suing to enforce this mortgage-deed, his suit would be dismissed. Even supposing I were to dismiss this appeal and leave the decree of the lower Appellate Court as it stands, and that decree were to result in the dismissal of the plaintiff's suit for a declaration, there would still remain on record the finding between the parties that the plaintiff was a minor when he executed this mortgage. No suit could, therefore, be brought by Sarfaraz Chaudhri on this deed with any hope of success. It appears to me, therefore, that to refuse the plaintiff a declaration that this deed is void in law, except on condition of his paying to the defendant, Sarfaraz, the mortgage-money, is logically equivalent to trying to compel the plaintiff to pay what he is not bound in law to pay. There might be something to be said for such a decree as was passed in this case by the Court of first instance; but the lower Appellate Court has in effect held that the plaintiff is not entitled to a declaration that this mortgage-deed is void unless he first pays into Court the entire amount

due under it including interest up to date and the whole costs of the defendant, that is, everything which the defendant could possibly claim in a suit brought by him as plaintiff to enforce the provisions of this void contract. I incline to the opinion that the discretion conferred upon the Courts by S. 41 of the Specific Relief Act must be so interpreted and exercised as only to impose upon a plaintiff seeking relief by way of cancellation of an instrument such conditions as the law would impose upon him if the position of the parties were reversed and he were the defendant in a suit brought to enforce the instrument according to its terms. It seems to me impossible in any case to affirm the decree of the learned District Judge, and my own view of the law as at present advised is that the plaintiff's suit should have been decreed as brought. I set aside the decrees of both the Courts below and decree the plaintiff's suit for a declaration as brought with costs throughout.

Appeal allowed.

A. I. R. 1915 Allahabad 211

RAFIQUE, J.

Kedar Rai and another—Respondents.
Applicants

v.

Sheopal Rai and another—Appellants.
Opposite Parties.

Second Appeal No. 367 of 1914, decided on 19th February 1915.

Civil P. C. (5 of 1908), O. 32, R. 4 (4)—Appellant must pay Court Officer guardian's costs.

Where an appeal is filed against a minor under the guardianship of an officer of the Court, the appellant must pay to such guardian such sum of money as would enable him to oppose the appeal.

Harnandan Prasad—for Applicants.

Haribans Sahai—for Opposite Parties.

Judgment.—In Second Appeal No. 367 of 1914 one of the respondents is a minor and he has been served at the instance of the appellant under the guardianship of the Central Nazir of the Judge's Court, Benares. The Nazir has made an application under Order XXXII, Rule 4, Civil Procedure Code, praying this Court to order payment to him of a sum of money

(3) (1909) 1 I.C. 562=31 All. 21.

(4) (1910) 8 I.C., 888.

sufficient to enable him to oppose the appeal in this Court. The learned Vakil for the appellant says that he does not wish to retain the name of the minor among the respondents any longer, as he finds that the minor is not a necessary party. He also objects to any order being made by this Court directing any sum of money to be paid to the Nazir which the latter may have incurred up to this time in connection with the appeal. The appellant is at liberty to release any of the respondents. But I do not think that he can evade payment of actual out-of-pocket costs which the Nazir has incurred in connection with the present appeal. Mr. Harnandan Prasad who appears for the Nazir says that Rs. 28 have been spent by the Nazir up to this time. The details of the expenditure are as follows :—

	Rs.
<i>Vakalatnama</i> ...	2
<i>Application</i> ...	2
<i>Process fee</i> ...	3
<i>Another application</i> ...	2
<i>Process fee</i> ...	3
<i>Mr. Harnandan Prasad's fee.</i>	16

I think that as the Nazir has already spent a sum of Rs. 28 on account of the appellant having made the minor a respondent to the appeal, the appellant must pay that sum to the Nazir. I, therefore, direct the appellant to pay the sum of Rs. 28 to the Nazir through his Vakil Mr. Harnandan Prasad before the hearing of the appeal. Order as to the release of the minor will be made at the hearing of the appeal to the effect that the appeal stands dismissed as against him. In case the appellant does not pay the said money, it will be recovered as costs in the case.

Application allowed.

A. I. R. 1915 Allahabad 212

RICHARDS, C. J. AND PIGGOTT, J.

Qasim Beg—Plaintiff—Appellant

v.

Muhammad Zia Beg—Defendant—Respondent.

Second Appeal No. 911 of 1914, decided on 3rd July 1915, from the decision of the Addl. J., Allahabad, dated 28th March 1914.

Limitation Act (9 of 1908), Arts. 91 and 120—Time for suit for declaration of mortgage being ineffectual for want of consideration runs from date of mortgage—Mortgage.

The limitation for a suit for declaration that a mortgage deed executed by the plaintiff was without valid consideration and ineffectual and that the defendant had no right under it, begins to run from the date of the execution of the document. [P. 212, C. 2.]

A. Haider—for Appellant.

B. E. O'Connor—for Respondent.

Richards, C. J.—This appeal arises out of a suit in which the plaintiff sought a declaration that a bond, dated the 5th of October 1904 and executed by him, mortgaging certain property being without valid consideration is ineffectual, and that the defendants had no right under it. The Court of first instance decreed the claim. The lower Appellate Court allowed the appeal and dismissed the suit.

The plaintiff's own case is that the bond in question was executed in favour of the defendant, who was a relation of his, for the purpose of defeating actual or possible creditors. The present suit was not instituted until the 26th of July 1913, that is to say, about nine years after the execution. The lower Appellate Court has dismissed the suit solely on the ground that it is barred by limitation.

Article 91 provides that "a suit to cancel or set aside an instrument not otherwise provided for shall be brought within three years from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him." If Article 91 is appropriate, it seems to me that the facts which entitled the plaintiff to bring the present suit were that no consideration had passed and that the bond was only executed for the purpose of defeating his creditors. These facts were known to the plaintiff the day he executed the bond.

Article 120 provides that "Where no period of limitation is provided elsewhere in the Schedule, the suit must be brought within six years from the time when the right to sue accrues."

If Article 120 is appropriate, it seems to me that it is clear that what gave the plaintiff a right to bring the present suit was that there was no consideration paid, or intended to be paid. His right to sue, therefore, accrued at the very time when he executed the bond and his suit had to be brought within six years. If it were necessary to decide which Article of the Limitation Act applies, I am inclined to think Article 91 is the appropriate Article. If the bond was altogether fictitious, it

ought to be cancelled and a note made of its cancellation in the Registration Office as provided by Section 39 of the Specific Relief Act. Cancellation of the bond was the real relief to which the plaintiff was entitled, if he proved his case and the suit was brought within time.

There are many cases in which a party might be entitled to a declaration that a deed did not bind him, while he would not be entitled to have the deed cancelled.

It is contended that whether we apply Article 91 or Article 120 the fact which entitled the plaintiff to have the instrument cancelled or the time when his right to sue accrued, was when he apprehended a suit would be brought against him. It seems to me that though his apprehension may have been a reason for bringing the suit, it was neither the fact which entitled him to have the instrument cancelled within the meaning of Article 91, nor was it by reason of his apprehension that the right to sue accrued to him within the meaning of Article 120.

There have been a number of cases cited none of which seem to me to be very much in point, except the case of *Singarappa v. Talari Sanjivappa* (1). The learned Judges seem to have suggested that the right to have a document set aside was when the party had reasonable apprehension that such instrument if left outstanding would cause him serious injuries, and they referred to Section 39 of the Specific Relief Act. In my opinion Section 39 merely states under what circumstances a plaintiff can bring a suit for the setting aside of a document. The section is clearly subject to the provisions of the Limitation Act. In my opinion the decision of the Court below was quite correct and ought to be confirmed. I wish to say in conclusion that I am deciding the case on its own facts and circumstances.

Piggott, J.—In concurring with the decision of the learned Chief Justice in this case I wish to add a few remarks, principally because of the authorities which have been quoted on the other side, and I would mention the case of *Vithai v. Hari* (2) in addition to the Madras case referred to by the Hon'ble Chief Justice. I mention that case as the type of a number of others in which the essential relief sought by the

plaintiff was the recovery of possession, or in which at any rate a cause of action was afforded by actual interference with the plaintiff's possession. I think all cases of this sort are easily distinguishable from the one now before us. On its facts even the case reported in *Singarappa v. Talari Sanjivappa* (1) is distinguishable from the present, on the ground that the deed sought to be set aside was a deed of sale and that it was an essential part of the plaintiff's case that he had continued in possession in spite of the execution of that deed, and that he got his cause of action owing to an attempt on the part of the defendant to interfere with his possession. The line of reasoning, however, adopted by the learned Judges of the Madras High Court in that case is in favour of the contention of the appellant now before us. With all respect to the learned Judges, I can only say that a general application of the principles suggested in this decision, and in particular their application to the present case, would amount to something like a *reductio ad absurdum* of the relief intended to be allowed by the Legislature by means of declaratory suits. In a case like the present the plaintiff, the executant of the disputed document, was fully entitled to wait quietly at home until the defendant brought a suit to enforce the mortgage. As against such a suit all the pleas put forward in this case would have been available as a defence. The period of limitation for a suit on the mortgage-deed had barely three more years to run when the plaintiff came into Court with the present suit. The object of allowing a declaratory suit to be brought at all in such circumstances as the present is for the perpetuation of testimony, when the plaintiff is apprehensive that, if he waits for the opposite party to take action against him, evidence at present readily available would become difficult or impossible to obtain. I think that is why a narrow period of limitation was prescribed for suits to which Article 91 of the Indian Limitation Act applies. There is no doubt that attempts are frequently made to secure a longer period of limitation by drafting the plaint so as to evade all reference to Section 39 of the Specific Relief Act (I of 1877) and to claim a mere declaration instead of the full relief prescribed by that section. It is open to ques-

(1) (1905) 28 Mad. 349 = 15 M.L.J. 228.

(2) (1901) 25 Bo n. 78 = 2 Bo n. L R. 633.

tion how far litigants should be encouraged to claim the benefit of the general Article 120 of the first Schedule to the Indian Limitation Act by going out of their way to ward their plaint so as to escape the application of Article 91. Regard should undoubtedly be had to the essence of the suit rather than to the particular colouring sought to be put upon it by the plaintiff. I am content, however, to deal with this case on the assumption that Article 120 applies. If so, the test which I would suggest is, whether the present suit could or could not have been instituted prior to what the plaintiff alleges to be the origin of his cause of action, namely, the day on which the defendant, in some way not clearly specified, showed an intention to institute a suit in respect of the money apparently due on the face of this bond. In my opinion, if the plaintiff had come into Court within a year, or within a month, or within a week of the execution of this deed, alleging that he had been induced to execute it as a matter of policy, and (as his witnesses have deposed) in order to protect the property therein referred to from the attack of creditors whom the plaintiff feared, but that he had repented of his conduct and realised that, so long as the deed was in existence, the defendant might make a dishonest and improper use of it against him, he would have had a proper and valid cause of action for the very declaration which he seeks in the present case. On this ground, therefore, it seems clear to me that the right to sue for a declaration in respect of this bond accrued to the plaintiff on the day on which it was executed and that time was always running against him. I, therefore, concur in the finding that the present suit was rightly dismissed by the learned District Judge.

By the Court.—The order of the Court is that we dismiss the appeal with costs.
Appeal dismissed.

A. I. R. 1915 Allahabad 214

CHAMIER, J.

Mst. Phul Bibi—Plaintiff—Appellant
v.

Zahur Ali and others—Defendants—Respondents.

Second Appeal No. 1163 of 1913, decided on 16th March 1915, from the decision of the Addl. J., Gorakhpur, dated 13th August 1913.

Landlord and Tenant—*Ejected tenant has no right to appertaining house.*

A tenant who has been ejected from his holding cannot keep possession of the house appertaining to the holding. [P. 214, Col. 2.]

Suleman and Iswar Saran—for Appellant.

Haribans Sahai—for Respondents.

Judgment.—This appeal arises out of a suit brought by Phul Bibi, now represented by the appellant Bela Bibi, for possession of a house, *bhusauli*, cattle-trough, *et cetera*, on the allegation that one Kariman occupied them as appurtenances to his holding under the plaintiff and that Kariman died without issue; but *Musammât Elaichi*, a daughter of Kariman's wife, who had died, had set herself up as a daughter of Kariman. The defendants in the suit are the sons and husband of *Musammât Elaichi*. The plaintiff alleged that the defendants had entered into possession of the holding and of the house property in dispute though they were not entitled to do so as heirs of Kariman, and that they had been ejected from the holding by the Revenue Court. The defendants pleaded that on the death of Kariman, *Elaichi*, who was his daughter, entered into possession of the house property. They also pleaded that they were tenants along with *Elaichi* of other lands in the village and that they could not be ejected from the house while they still cultivated land in the village, though that land did not belong to the plaintiff. The lower Appellate Court found that the defendants were the sons of *Elaichi* who was the daughter of Kariman, that the defendants' mother had been ejected from the holding by the Revenue Court, but that they were entitled to retain possession of the house property. I remitted two issues to the lower Appellate Court by my order of July 2nd last and on these issues the Additional Judge has found that the house *bhusauli*, *et cetera*, were appurtenant to the holding of Kariman, that defendants had been ejected from their entire holding in the *khalsa* land, with which alone the plaintiff was concerned, and that the plaintiff had no interest whatever in any land that might still be in the cultivation of *Elaichi*. On these findings it seems to me that the plaintiff is entitled to succeed. The house was appurtenant to the holding *Elaichi* failed to get possession of the holding and the defendants have been ejected from the holding. The defendants

cannot in any view of the case retain possession of house property.

It appears that the original plaintiff, Phul Bibi, died after my order of July 2nd. The lower Appellate Court brought *Musammam* Bela Bibi in as representative of the original plaintiff. When this was brought to my notice, I required Bela Bibi to submit an application for substitution of names to this Court. Such an application was presented and under the orders of Mr. Justice Rafique the name of Bela Bibi was substituted for that of Phul Bibi. Now it is said that I cannot take any notice of the findings of the lower Appellate Court, because they were arrived at before the passing of the order of this Court substituting Bela Bibi for Phul Bibi. It is not suggested by the learned Vakil for the defendants that he has any further evidence to offer on the subject or that he was in any way prejudiced by the mistake of procedure that was committed. His opponent was and is Bela Bibi and in these circumstances, I see no reason why I should send the case back in order that the District Judge may rewrite his order. On the facts as found, I hold that the plaintiff is entitled to possession of the property in suit as against the defendants who appear to me to have never had any title whatever. I allow this appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs here and in the lower Appellate Court.

Appeal allowed.

A. I. R. 1915 Allahabad 215

KNOX, J.

Mst. Manohri—Plaintiff—Appellant

v.

Bhura—Defendant—Respondent.

Second Appeal No. 656 of 1914, decided on 20th May 1915, from a decision of the Dist. J., Saharanpur, dated 30th April 1914.

Agra Tenancy Act (2 of 1901), S. 197—In suit for ejectment question of proprietary title raised but not decided—District Judge on appeal should have decided the plea of jurisdiction.

In a suit instituted in a Revenue Court for ejectment on the ground that the defendant was in possession without the plaintiff's consent and without the payment of any rent, the defendant pleaded that he was in proprietary and adverse possession of the land but this issue was not tried;

Held, that the District Judge on appeal ought to have acted under the provisions of Section 197 of the Agra Tenancy Act and disposed of the plea of jurisdiction. 16 I.C. 120 Foll. and 20 I.O. 892 Ref.

Nihal Chand—for Appellant.

M. L. Agrawala—for Respondent.

Judgment.—The suit out of which this appeal arises was instituted in the Court of an Assistant Collector. The suit as laid was for the ejectment of one Bhura. The Court of first instance passed an order for ejectment. Bhura appealed from the decree to the Court of the District Judge of Saharanpur. The allegation of the plaintiff was to the effect that the defendant was in possession of the land in dispute without the consent of the plaintiff and without the payment of any rent, and the defendant on the other hand raised the plea that he was in proprietary and adverse possession of the land. This issue apparently was never tried. The District Judge held that the suit did not lie under the Tenancy Act, as the Revenue Courts had no power to eject a trespasser. The learned Judge admitted in his judgment that he was bound by a ruling of this Court in *Balli v. Naubat Singh* (1), but he has preferred to follow what he himself calls an *obiter dictum* in *Nandan Singh v. Ganga Prashad* (2) together with Selected Decision No. 3 of 1910 of the Board of Revenue.

The learned Judge might with more propriety have saved himself all this extraordinary procedure on his part and confined himself to the law as laid down in Section 197 of the N. W. P. Tenancy Act.

I set aside the decree of the lower Appellate Court and send the case back to that Court, with directions to re-admit the appeal on its file of pending appeals and dispose of it according to law. Costs will follow the event.

Decree set aside; Case sent back.

(1) [1912] 16 I.C. 120.

(2) [1913] 20 I. C. 892=35 All. 512.

A. I. R. 1915 Allahabad 216

CHAMIER, J.

Naikram—Plaintiff—Appellant

v.

Jawala Prasad—Defendant—Respondent.

Second Appeal No. 471 of 1914, decided on 4th March 1915, from a decree of the Dist. J., Agra.

Grant—Construction—Grant of land for grove with right to replace and condition of payment of revenue if assessed—Held it created interest and was not removeable license—As no time was fixed for planting, it cannot be recovered for breach of condition unless condition rendered impossible.

Where a land was granted for the purpose of planting a grove with a provision that the grantee might cut down the trees and re-place them as often as he pleased, and might appropriate to his own use the produce of the trees, grass and any other produce of the land and if any revenue was assessed on it the grantee had to pay it :

Held, that the grant created an interest in the land in favour of the grantee and it was not a license revocable at the will of the grantor.

[P. 216, C. 2.]

Held, further, that as no time was specified in the grant to plant the grove, the condition could not be said to have been broken until the grantee rendered the plantation impossible either permanently or for an indefinite period.

W. K. Porter and Shiam Krishan Iyer—for Appellant.

Nihal Chand—for Respondent.

Judgment.—This appeal arises out of a suit brought by the appellant for possession of some plots of land which were made over to the respondent under a document, dated April 14th, 1883, and described as an "*ijazat nama waste lagane bagh ke*." It appears that there has been other litigation between the parties in the Revenue Court. The appellant sued for ejectment of the respondent on the ground that he had allowed a certain person to hold possession as *shikmi* for a longer period than is permitted by the Tenancy Act. The respondent pleaded that he was the proprietor of the land. That question was not decided, for the Court dismissed that suit on the ground that the so-called *shikmi* was merely a servant of the respondent. Next the appellant brought a suit for recovery of rent from the respondent. The Assistant Collector held that the respondent was a proprietor and not a tenant. The Collector on appeal confirmed the dismissal of the suit, on the ground that the relation-

ship of landlord and tenant was not proved to exist between the parties. There was a second appeal to the District Judge who held that the respondent was either a proprietor or a rent-free-holder, and in either case was not liable to pay a rent. The appellant then brought the present suit.

His case is that the land was granted to the respondent under the document mentioned above for the purpose of planting a grove and that though many years have elapsed, the respondent has planted no trees. The appellant, therefore, claims to be entitled to recover the land from the respondent whom he describes as a mere licensee. The Munsif held that the document in question did not confer on the respondent proprietary rights in the land but that it was a grant, permanent in its nature, made for the purpose of planting trees, that the respondent had planted a large number of trees, though not as many as he might have planted, and that the condition of the grant had, therefore, been sufficiently complied with. Accordingly he dismissed the suit. On appeal the District Judge held that the document of April 1883 did not evidence a mere license and that the grant was not revocable at will. The learned Judge was of opinion that the document conferred an interest in the land on the respondent, that the position of the respondent is analogous to that of a lessee, and that, therefore, the suit is not maintainable in the Civil Court. The document of April 14th, 1883, has been read out to me, and I am inclined to think that the intention of the parties to it was that the respondent should have the right of an ordinary grove holder. The document provides that the respondent shall plant trees on the land, may cut down those trees and re-place them as often as he pleases, and may appropriate to his own use the produce of the trees, grass and any other produce of the land, that if any revenue is assessed on the land the respondent is to pay it and that, if the respondent or his successor wishes to sell the grove, the grantor will have a right of pre-emption. It is quite clear to me that this document evidences something much more than a license revocable at will. I have myself little doubt that the intention was that the respondents should not be entitled to retain the land unless he planted a grove on it, and it appears to me that

it is not a grant to which the provisions of Chapter X of the Tenancy Act are applicable. The document fixes no time within which the grove is to be planted and it does not provide for resumption of the land in case the respondent does not plant the grove. In these circumstances it appears to me that the appellant is not entitled to recover possession merely because it is proved that the respondent has not planted a grove on the land, and I, therefore, see no reason for sending the case back to the lower Appellate Court for a finding on the question whether a grove has been planted or not. It seems to me that the document evidences the creation of an interest in the land in favour of the respondent subject to the condition that he shall plant a grove. But as no time is specified for the performance of the condition, the condition cannot be said to have been broken until the respondent renders the performance of the condition impossible either permanently or for an indefinite period (see Section 33 of the Transfer of Property Act). The appellant alleges that the land is under cultivation. If so, a grove may yet be planted on the land. In my opinion the appellant has made out no cause of action for recovery of the land in question. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 217

PIGGOTT, J.

Mohammad Yasin—Applicant

v.

Cheda Lal and another—Opposite Party.

Criminal Revn. Appln. No. 292 of 1915, decided on 19th May 1915, from an order of the S. J., Meerut.

Criminal P. C. (5 of 1898), S. 195—Small Cause Judge refusing to sanction prosecution application under S. 195 (b) made to District Judge—Application is not Criminal appeal—Sessions Judge had no jurisdiction.

An application was made to a Judge of the Court of Small Causes for sanction to prosecute the applicant in respect of offences under Sections 195, 467 and 471 of the Penal Code, committed in an execution proceeding before him. The application was rejected. The matter was taken up to the District Judge under Section 195, clause 6, of the Criminal Procedure Code. In that Court the application was registered as a criminal appeal :

Held, that the application should not have been registered as a criminal appeal as it was a matter

in which the Sessions Judge had no jurisdiction. Case Law Ref. [P. 218, C. 1.]

M. L. Agarwala—for Applicant.

S. N. Sen—for Opposite Party.

Judgment.—The applicant in this case is one Mohammad Yasin, who on the 21st of February 1914 applied for execution of a certain decree in the Court of Small Causes at Meerut, alleging himself to be a transferee of the decree. He produced a sale-deed purporting to be executed by the decreet-holder. On inquiry the Court held the genuineness of that deed to be open to great suspicion and rejected Mohammad Yasin's application. The original decreet-holder having died during the pendency of these proceedings, there was some little delay, perhaps not unnatural under the circumstances, before his sons applied to the Judge of the Court of Small Causes for sanction to prosecute Mohammad Yasin in respect of offences punishable under Sections 193, 467 and 471, Indian Penal Code, alleged to have been committed by him in the course of this transaction. The application came before the successor of the learned Judge who had tried the matter on the civil side, and sanction was refused by an order dated the 15th August 1914. On the 28th of October 1914, the applicants for sanction brought the matter before the District Judge of Meerut under Section 195, clause (6), of the Code of Criminal Procedure. It appears that in this Court a somewhat curious practice prevails of registering applications to the District Judge under this particular provision of the Code of Criminal Procedure as "criminal appeals." One result of this practice was that the learned District Judge felt considerable doubt as to whether the application before him was not barred by Article 154 of the first Schedule to the Indian Limitation Act (IX of 1908). He decided, however, to overrule the objection as to limitation and for the reasons given in his order, dated the 17th of November 1914, he granted the sanction applied for.

The matter was brought before this Court by present application presented on the 13th April, 1915, and a further result of the system of registering such applications as criminal appeals in the Court of the District Judge of Meerut has been that the application now before me has been admitted, and notice issued to the opposite side, as an application in criminal revision. On the reported authorities and settled

practice of this Court, there can be no doubt whatever that this ought not to have been done. Although in the Court below the application to the District Judge was registered as a criminal appeal, it was an application to the District Judge. It was an application in a matter in which the Sessions Judge could have no possible jurisdiction. I do not think the parties concerned were under any misapprehension as to the matter being before the District Judge of Meerut and not before the Sessions Judge. For authorities in this Court I am content to refer to decision of the Full Bench in *Salig Ram v. Ramji Lal* (1). It is an arguable point, on the wording of Section 195 of the Code of Criminal Procedure, and a point as to which there has been difference of opinion between the various High Courts, whether under the circumstances stated Mohammad Yasin is not entitled to bring the matter before this Court by a further application under Section 195, clause (6), of the Code of Criminal Procedure. This point has, however, been settled in the negative so far as this Court is concerned ever since the decision in *Kanhai Lal v. Chhadammi Lal* (2). The only revisional jurisdiction, therefore, which I can be asked to exercise in the matter is that limited by Section 115 of the Code of Civil Procedure. I am content to say that I find no valid cause for interference under that section.

The application is dismissed.

Application dismissed.

- (1) (1906) 28 All. 554=3 A. L. J. 394=
1906 A. W. N. 103=3 Cr. L.J. 400 F. B.
(2) (1909) 1 L.C. 5=31 All. 48=9 Cr. L.J. 63.

A.I.R. 1915 Allahabad 218

RAFIQUE, J.

Jamiluddin and others—Defendants-Appellants

v.

Hafiz Abdul Majid—Plaintiff-Respondent.

Second Appeal No. 187 of 1914, decided on 22nd February 1915, from the decree of Addl. Sub. J., Allahabad, dated 15th November 1913.

(a) Custom—Purdah has been observed in U.P. since centuries—Easement.

In the United Provinces the custom of *purdah* has, for centuries been strictly observed by all Hindus and Muhammadans except the poorest.

10 All. 358 Followed. [P. 218, C. 2 & 219, C. 1.]

(b) *Easement Act* (5 of 1882), S. 18—*Inter-*

vention of space does not affect right of privacy if invaded by new construction.

The intervention of a space between two houses cannot affect the right of privacy if, as a matter of fact, that right is invaded by the new constructions complained of. [P. 219, C. 2.]

Giridhari Lal Agarwala and Shaila Nath Mukerji—for Appellants.

Iqbal Ahmad—for Respondent.

Judgment.—The parties to this appeal are neighbours and they live in *Mohalla Bakhtiari* in the city of Allahabad. The defendants-appellants made certain additions to their house, which according to the plaintiff-respondent invaded the privacy of his house. He instituted a suit in the Court of the Munsif of Allahabad for the closing of the doors in the verandah marked A and B respectively on the plan and for the demolition of parapets marked C and D and for a perpetual injunction restraining the defendants from doing any similar acts in future. The claim was resisted on various grounds. It was alleged in defence that no custom of *purdah* prevailed in the *Mohalla* of Bakhtiari, that the house of the plaintiff was overlooked by other houses, that the plaintiff had no right of privacy, and that he had acquiesced in the new constructions complained of. The learned Munsif after inspection of the spot and recording the evidence came to the conclusion that the additions made by the defendants to their house encroached upon the privacy of the plaintiff and decreed the claim accordingly. The defendants appealed and the learned Additional Subordinate Judge affirmed the decree of the first Court. The defendants have come up in second appeal to this Court and repeat the pleas which they had taken in defence before the first Court. I shall consider the grounds of appeal *seriatim*. By the first ground of appeal it is contended that the custom of *purdah* does not obtain in the *Mohalla* Bakhtiari. Both parties produced evidence on this point, and the lower Courts, after carefully considering the evidence, came to the conclusion that the custom of *purdah* does prevail in the *Mohalla*. But apart from the evidence in the case it has been laid down by this Court in the well-known case of *Gokal Prasad v. Radho* (1) that "at any rate in these Provinces the custom of *purdah* has for centuries been strictly observed by all Hindus except those of the

- (1) (1889) 10 All. 358=1889 A.W.N. 135.

lowest classes and by all Muhammadans except the poorest." The fact that *purdah* is observed both by the Hindus and the Muhammadans in these Provinces except the poorest classes admits of no doubt or discussion. The parties to this appeal are Muhammadans among whom *purdah* is observed more strictly and more generally. The first ground of appeal is quite baseless.

The second ground of appeal is to the effect that the plaintiff has failed to prove a right of privacy. This plea is not quite intelligible. The learned Vakil who appears for the appellants explains it by saying that the enclosure to the courtyard of the plaintiff is in bad repairs and does not sufficiently protect the women of the plaintiff's house from the gaze of neighbours and passers-by and hence the plaintiff has no right of privacy. In support of this reference is made to a remark in the judgment of the lower Appellate Court, which is to the effect. "It is true that this compound is not complete and is not the inner courtyard of a building intended for females, but the fact remains that it is part of the house which is in occupation of the plaintiff's females who do keep *purdah*." I am unable to infer from this passage that the courtyard of the plaintiff is in such bad repairs as to expose the females of the plaintiff's house to the gaze of the neighbours or the passers-by and thus deprive the plaintiff's females of their right of privacy.

The third ground of appeal is to the effect that the plaintiff's house is overlooked by other houses of his neighbours and the courtyard is open to public view. The lower Appellate Court has held that it has not been clearly established that the plaintiff's house is overlooked by some other houses of his neighbours. This is a finding of fact and cannot be questioned at this stage. Besides, as remarked by the lower Appellate Court, the fact that a woman appears before certain persons is no reason for supposing that she would allow herself to be seen by other persons who are strangers to her. I reject the third ground of appeal.

The contention embodied in the fourth ground of appeal is that a public road or a plot of *nazul* land and certain other plots of land intervene between the house of the plaintiff and that of the defendants and, therefore, the plaintiff has no cause of

action. No authority has been cited in support of this contention. On the contrary there is an authority against it, vide *Kavariji Premchand v. Bai Javer* (2). The intervention of a space between two houses cannot affect the right of privacy if, as a matter of fact, that right is invaded by the new constructions complained of. This ground of appeal, therefore, fails and is rejected.

The fifth ground of appeal raises the question of acquiescence. It has been found by the lower Appellate Court upon evidence in the case that there was no acquiescence by the plaintiff in the new constructions. Nothing has been urged in support of the fifth ground of appeal which could make me take a view different from that taken by the Court below. I, therefore, disallow the objection. The appeal fails and is dismissed with costs. The learned Vakil for the appellants wants extension of time within which to carry out the directions in the decree. I allow three months' time for this purpose.

Appeal dismissed.

(2) (1869) 6 B. H. C. R. 143.

A.I.R. 1915 Allahabad 219

CHAMIER AND PIGGOTT, JJ.

Sarju Prasad—Plaintiff—Applicant

v

Mahadeo Pande and others—Defendants—Respondents.

Civil Revn Petn. No. 139 of 1914, decided on 7th May 1915 from the order of Addl. Sub-J., Gorakhpur.

Provincial Small Cause Courts Act, (9 of 1887) S. 37—Small Cause Court nature's suit transferred to regular and tried as regular suit—Appeal lies.

A suit of a Small Cause Court nature was filed before a Munsif, who had the powers of a Small Cause Court Judge, and was registered as a Small Cause Court suit. Subsequently the Munsif was succeeded by an officer who had no Small Cause Court powers. The latter officer ordered the case to be transferred to the regular side and tried it as a regular suit. An appeal against his decision was dismissed on the ground that no appeal lay.

Held, that an appeal did lie. A. I. R. 1914 All. 119 appr. of. 13 All 324 not Foll. and Case Law Ref. [P. 220, Cal. 2 & P. 221, C. 1.]

Jogendra Nath Mukerji—for Applicant.
Sital Prasad Ghose—for Respondents.

ORDER OF REFERENCE.

This is an application for revision of an order of the Additional Subordinate Judge of Gorakhpur, rejecting an appeal on the ground that the suit out of which

it arose was a Small Cause Court suit and, therefore, no appeal lay. The facts are that the suit was instituted in the Court of an officer who had been invested with the power of a Judge of a Small Cause Court up to a certain pecuniary limit. The suit was registered on the Small Cause Court side. Sometime after the written statement had been filed the Munsif went on leave and was succeeded by an officer who had not been invested with the powers of a Small Cause Court. The latter officer passed an order transferring to the regular side all Small Cause Court suits which he then found pending in the Court and he tried out those cases as regular suits. The Subordinate Judge purports to follow the decision of this Court in *Mangal Sen v. Rup Chand* (1) in holding that no appeal lay. In the case of *Kamta Parshad v. Mahabal Singh* (2), Mr. Scott and I were unable to accept the construction placed upon Section 35 of the Provincial Small Cause Courts Act by this Court in the case cited, and it appears to me that a further recent decision of Mr. Justice Knox in *Shiam Behari Lal v. Kali* (3) is inconsistent with the decision in that case. I am of opinion that the recent decision of Mr. Justice Knox is correct and I explained my reasons for the view which I have taken of Section 35 in the case of *Kamta Parshad v. Mahabal Singh* (2); but sitting alone I do not feel justified in deciding contrary to the decision of a Bench of two Judges of this Court. I, therefore, refer this application for revision to a Bench of two Judges.

Judgment—This is an application for revision of an order of the Additional Subordinate Judge of Gorahpur, rejecting an appeal by the appellant on the ground that the suit out of which it arose was a Small Cause Court suit and, therefore, no appeal lay. The facts are that the suit was instituted in the Court of a Munsif who had been invested under Section 25 of the Bengal, North-Western Provinces and Assam Civil Courts Act, XII of 1887, with the jurisdiction of a Judge of a Court of Small Causes up to a certain pecuniary limit. The suit was registered on the Small Cause Court side.

Sometime after the written statement had been filed the Munsif went on leave and was succeeded by an officer who had not been invested with the jurisdiction of a Judge of a Court of Small Causes. The latter officer passed an order transferring to the regular side all Small Cause Court suits which he found pending in the Court and tried them out as regular suits. One of those suits was the suit out of which this application has arisen. The Munsif dismissed it and the plaintiff appealed. The Subordinate Judge purporting to follow the decision of this Court in *Mangal Sen v. Rup Chand* (1) has held that no appeal lay. The facts of that case are not on all fours with those of the present case, for in that case an order had been passed under Section 25 of the Code of Civil Procedure of 1882, and the Court was of opinion that under the last paragraph of that section the Court to which a Small Cause Court suit is transferred must, for the purposes of the suit, be deemed to be a Court of Small Causes. It is true that the learned Judges referred also to Section 35 of the Provincial Small Cause Courts Act and indicated that their opinion would have been the same whether the case were transferred under Section 25 of the Code of Civil Procedure or Section 35 of the Provincial Small Cause Courts Act. The decision referred to has been dissented from by the Calcutta High Court in *Dulal Chandra Deb v. Ram Narain Deb* (4), and also by the Bombay High Court in *Ramchandra v. Ganesh* (5). In Oudh the view taken for several years past has been that which has been adopted by the Calcutta and Bombay High Courts, vide *Kamta Parshad v. Mahabal Singh* (2). In a very recent case, *Shiam Behari Lal v. Kali* (3), Mr. Justice Knox, who was one of the Judges, who took part in the decision of the case of *Mangal Sen v. Rup Chand* (1), held that in a case of this kind the officer who succeeded the officer before whom the suit was filed was bound to try such a suit as this as a regular suit. A decree had been passed in the form of Small Cause Court's decree. Mr. Justice Knox held that the unsuccessful party had been prejudiced by the procedure adopted inasmuch as he had been deprived of the right of appeal, and

(1) (1891) 13 All. 324=1891 A. W. N. 96.

(2) (1903) 6 O.C. 81.

(3) A.I.R. 1914 All., 119=22 I.C. 909.

(4) (1904) 31 Cal. 1057.

(5) (1899) 23 Bom. 382.

he set aside the decree. The view taken in the case of *Shiam Behari Lal v. Kali* (3) is in agreement with the view taken by the Calcutta, Bombay and Oudh Courts and is, we think, correct. It seems to us that under Section 35 of Act IX of 1887 the Munsif who tried the suit, not having been invested with the jurisdiction of a Court of Small Causes, was bound to try out the suit as a regular suit, and that there was a right of appeal against his decision. We allow this application, set aside the order of the Subordinate Judge, return the record to his Court and direct that the appeal be restored to the pending file and disposed of according to law. Costs of this application will be costs in the cause.

*Application allowed ;
Order set aside.*

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CHAMIER and PIGGOTT, JJ.

Emperor—Appellant

v.

Dip Narain—Accused-Respondent.

Criminal Appeal No. 995 of 1914, decided on 26th January 1915, against the order of Sessions J., Azamgarh.

Evidence Act, (1 of 1872), S. 28—Confession by one co-accused is admissible against all.

Where several persons were tried for an offence under Sections 211 and 109 of the Indian Penal Code and one of them entered confession, but not being convicted on the plea of guilty was tried jointly with the other accused :

Held, that his confession was admissible in evidence as against all the accused.

C. C. Dillon, S. C. Mukerji, Surendra Nath Sen, R. K. Malviya and Iqbal Ahmed—for Accused.

Ryves—for the Crown.

Judgment.—This is an appeal by the Local Government against the acquittal of one Dip Narain, who was convicted by a Magistrate of the first Class of an offence punishable under Sections 211-109 of the Indian Penal Code, but acquitted by the learned Sessions Judge of Azamgarh on appeal. As a matter of fact nine persons were put on their trial before the Magistrate, all of whom were convicted and all of whom appealed. The Sessions Judge dismissed seven of the appeals, but acquitted Dip Narain and one *Musammatalia*. There has been no appeal against the acquittal of the latter.

The task before us is a simpler one than was before the Courts below, as many

matters which were in controversy there have been accepted in argument in this Court as fully established by the evidence. We find that Gaya Sunar, resident of Shahzadpur in the Fyzabad District, was on bad terms with his relatives, Sarju and Lachhman. He somehow or other came to believe that a false charge brought against these persons could be successfully prosecuted, if suitable measures were taken, before a certain Bench of Honorary Magistrates exercising jurisdiction at Azamgarh. He came into Azamgarh for that purpose, and there got into communication with various persons, including Gulab Sunar and one Muhammad Ishaq, a dealer in timber. A conspiracy was hatched for the filing of a false complaint before a Bench of Honorary Magistrates consisting of Raja Muhammad Shah and Babu Krishen Deo Narain Singh. Salaran Teli of Azamgarh was employed to come forward as complainant, and it seems to us perfectly clear on the evidence, if indeed this much also has not been practically conceded in argument before us, that there were members of the conspiracy who professed to be able to ensure its success by bringing improper influence to bear on Babu Krishen Deo Narain Singh. Accordingly, on April 3rd, 1914, Salaran filed a complaint before the Honorary Magistrates already named, in which he falsely charged Sarju and Lachhman with having committed, within the jurisdiction of the said Magistrates, offences punishable under Sections 323, 406 and 417 of the Indian Penal Code. Salaran was examined on his complaint and put in a list of witnesses. We cannot refrain from remarking that a Magistrate of experience could scarcely have helped seeing that the story told by Salaran was a most extraordinary one, and that, even if it might prove on inquiry that there was any truth in the other allegations made by him, the story of the assault said to have been committed by Sarju and Lachhman on April 1st bore every appearance of being a piece of imaginative embroidery. The Honorary Magistrates, however, took cognizance of the complaint as one of "causing hurt" (under Section 323, Indian Penal Code) only, and issued process for the attendance of the accused persons and of the witnesses named by Salaran, fixing April 17th, 1914, for the trial. On that date Sarju and Lachhman

having come to Azamgarh and secured the services of Sheikh Faiyaz Husain, a local Mukhtar, presented a petition before the Sub-Divisional Magistrate asking for a transfer of the case against them to some other Court. There were allegations made in this petition which satisfied the Sub-Divisional Magistrate that prompt action was called for on his part. He transferred the complaint of Salaran to his own file, and went over in person to the Court of the Honorary Magistrates to take possession of the record and secure the attendance before himself of the complainant and his witnesses. The falsity of the complaint was at once disclosed. Salaran absconded; his witnesses denied all knowledge of the affair. The complaint was dismissed, and the Sub-Divisional Magistrate initiated a proceeding under Section 476 of the Code of Criminal Procedure which resulted in the trial out of which the present appeal has arisen.

As against Dip Narain, the case for the prosecution is that he was an active member of the conspiracy which organised the institution by Salaran of his false complaint of April 3rd, 1914, and more particularly that he was the member to whom the others looked as the instrument through which improper influence was to be brought to bear on the Honorary Magistrate, Babu Krishen Deo Narain Singh.

In this connection we may at once proceed to comment on one aspect of the case which calls for special notice. The learned Sessions Judge seems to have been much influenced by the view that the case for the prosecution involved serious allegations against this Honorary Magistrate. He considered those allegations grossly improbable and very inadequately supported by the evidence. He then followed out a train of reasoning according to which the acquittal of Dip Narain appears to follow as a necessary consequence on the failing of the prosecution to establish any specific charge of corruption or misconduct against Babu Krishen Deo Narain Singh. We are quite unable to look at the case in this light. The Honorary Magistrate was not on his trial. No charge was preferred against him, and no onus lay on the prosecution of establishing any such charge. The question with which we are concerned is whether Dip Narain represented himself, or was understood by the other conspirators, to be a

person in a position to bring corrupt influences to bear on the Honorary Magistrate. Whatever remarks we may find it necessary to make on any portions of the evidence, we have to bear in mind that the point for determination is the guilt or innocence of Dip Narain, and that his guilt is perfectly consistent with the entire innocence of the Honorary Magistrate.

When we come to ask ourselves whether there is anything seriously improbable in the suggestion for the prosecution that Gaya Sunar and his fellow-conspirators believed themselves able to influence the conduct of Babu Krishen Deo Narain Singh through Dip Narain, we find that there is reliable evidence on the record which lends plausibility to the suggestion. Dip Narain seems to be a local shopkeeper. He speaks of himself as a "tenant" of Babu Krishen Deo Narain Singh; but it does not appear that he has any ostensible connection with that gentleman, or any ostensible business of any kind, which should make him a constant attendant in the Court of the Honorary Magistrates on days on which Babu Krishen Deo Narain Singh is sitting. Yet Abdul Ghafur, *peshkar* of the Honorary Magistrates' Court, deposes as follows:—"Dip Narain comes daily when Babu Krishen Deo Narain sits. I have often been to Babu Krishen Deo Narain's house and I have seen Dip Narain there. Dip Narain used to give *pan* to Babu Krishen Deo Narain and Raja Mohammad Shah." This witness seems to us quite unshaken in cross-examination. The general tone of his evidence is by no means that of a man who has been got at to bolster up a charge against Dip Narain and to blacken the character of Babu Krishen Deo Narain Singh. He deposes that Dip Narain was present in Court on April 3rd when Salaran was examined on his complaint, but admits that he does not remember Dip Narain's presence on April 17th, though the latter is an admitted fact. He represents Dip Narain as ministering to the needs of both the Honorary Magistrates on the Bench when Babu Krishen Deo Narain Singh sits there. We accept his evidence as true, and we regard it as proving that Dip Narain habitually conducted himself in a manner calculated to impress outsiders with a belief in the existence of confidential relations between himself and Babu Krishen Deo Narain

Singh, particularly with reference to the proceedings of the latter on the Bench of Justice.

At first sight the above conclusion may not seem to carry us very far; but there is no getting away from the fact that in arriving at it we have virtually disposed of this appeal. For when once the case for the prosecution has been cleared of that mist of presumed improbability through which it presented itself to the eyes of the learned Sessions Judge, the evidence against Dip Narain is simply overwhelming. Setting aside for the moment all items of evidence as to which there has been serious controversy, we find on the record the statements of four witnesses, Girdhari, Amjad Ali, Neor and Chhitru, all of whom depose to having seen meetings of the persons accused of this conspiracy at the house of the accused, Gulab Sunar, and three of whom depose to the presence of Dip Narain at these meetings. These witnesses were believed in the Courts below, and have been relied on by the learned Sessions Judge as against all the accused persons other than Dip Narain and *Musammatt Talia*. Their evidence seems to us to have been procured under circumstances which practically exclude the defence theory of collusion and fabrication. In our Court only the evidence of Chhitru was seriously attacked, and this attack was based on a previous statement of his (one made in the course of the proceedings under Section 476 of the Code of Criminal Procedure) on which he had never been cross-examined. The accused persons were very efficiently defended in the Courts below, and if there had been any real force in the argument now pressed on our notice, we are confident that the alleged discrepancy would have been put to the witness Chhitru when he was recalled for cross-examination. The argument itself is based on an ambiguous phrase in Chhitru's former deposition. We do not find it convincing, and we regard the evidence given by these four witnesses as reliable. It has been argued that it is not conclusive; but it is evidence of facts which, in the absence of reasonable explanation, do connect Dip Narain with the presentation of Salaran's false complaint. It requires to be read in connection with the evidence of the *peshkar*, Abdul Ghafur. The association of Dip Narain with the other conspirators at

the house of Gulab, under the circumstances stated, is a matter from which the Court may reasonably infer his complicity in the conspiracy. Moreover the evidence of Amjad Ali carries the case even beyond the bounds of legitimate inference, for he deposes to a statement by Gulab that he was "getting up a case" and to a request for assistance from this witness.

Then there is the evidence of Fida Husain, the clerk of Mohammad Shafi, Mukhtar, who was engaged to act for Salaran in the prosecution of the false charge. He deposes to the active participation of Dip Narain in getting the false complaint drafted and in the arrangements made for its presentation in Court. He is corroborated by Mohammad Shafi himself, who even deposes that it was from Dip Narain's hand that he received a preliminary fee of one rupee. The Magistrate who tried the case looked upon Fida Husain as probably an accomplice, and was dissatisfied with the manner in which Mohammad Shafi fenced with certain questions put to him in cross-examination. More particularly, he thought the Mukhtar was not speaking the truth when he said that Fida Husain, though he had been his clerk, had ceased to act as such before the transactions in question in this case. The learned Sessions Judge seems to have worked up to the conclusion that all the evidence given by these two witnesses was deliberately false. Yet it is an undoubted fact that Mohammad Shafi was engaged to act for Salaran in the prosecution of Salaran's false complaint, and Fida Husain did write out the complaint filed by Salaran in Court and the power-of-attorney in favour of Mohammad Shafi. They were necessary witnesses to any inquiry into the circumstances under which Salaran's complaint came to be filed. The suggestion that they have embroidered on the facts which undoubtedly were within their knowledge, for the sake of getting Dip Narain into trouble, rests on the very slenderest of foundations. It was no doubt a very awkward thing for Mohammad Shafi, from the point of view of his professional career, to be suddenly caught out in the position of ostensible legal adviser to a gang of conspirators engaged in the manufacture of a flagrantly false case. The position would tend to make him somewhat economical of the truth while in the witness-box, and he may have influenced Fida Husain to be

the same. To this extent the evidence of the two witnesses requires to be cautiously considered ; but we find no real reason for disbelieving their evidence where it affects Dip Narain. That they are not the tools of any conspiracy for getting Babu Krishen Deo Narain Singh into trouble may reasonably be inferred from the fact that they say nothing whatever against him.

This is the position we have reached without even touching upon the two most controverted points in the case, the evidence of the witness Chedi Rangrez and the confession of the accused Muhammad Ishaq. If we could be sure that these two men spoke the truth to the best of their knowledge, we need not have discussed any other evidence. Both assert that the filing of Salaran's complaint was the outcome of an elaborate conspiracy, in connection with which Dip Narain was an important member, acting (or purporting to act) as go-between for the others in their dealings with Babu Krishen Deo Narain Singh. The confession of Mohammad Ishaq obviously requires to be taken into consideration against all the accused, the learned Sessions Judge, need have had no misgivings on this point. Muhammad Ishaq was not convicted on his plea of guilty, and he was tried jointly with the other accused. Under the circumstances of this case the trying Magistrate would have shown very poor discretion if he had convicted Muhammad Ishaq on his plea of guilty, thereby recording his belief in the substantial truth of Muhammad Ishaq's confession, before the other accused had even entered on their defence. The case obviously required the most thorough sifting out before any Court could say with confidence that Muhammad Ishaq's confession was substantially true, even where it implicated himself. As it is, the learned Sessions Judge has taken into consideration the confession of Muhammad Ishaq to a far greater extent than did the trying Magistrate ; only he has used it to discredit the witness Chedi and to throw doubt on the prosecution case generally, as if the prosecution could be made responsible for all the allegations which Muhammad Ishaq saw fit to make against the Honorary Magistrate.

We have no doubt that both the Courts below were right in thinking that both Mohammad Ishaq and Chedi had made statements which were palpably untrue. We should not think of convicting anyone except possibly Mohammad Ishaq himself on the confession *plus* the evidence of Chedi. Yet we think the learned Sessions Judge was quite mistaken in looking upon Chedi as a witness wholly unacquainted with the facts to which he purported to depose. He was probably telling about as much of the truth as he felt he could conveniently do without making it too obvious that his proper place was in the dock and not in the witness-box. Having said this much, we think it idle to enter upon conjectures as to why Mohammad Ishaq and Chedi should have said precisely what they did. On no reasonable theory do we find anything in these statements which shakes our belief in the rest of the prosecution evidence ; there is a complete case against Dip Narain without them.

The defence, as embodied in Dip Narain's own statement, we find to be singularly unconvincing. It rests upon the fact that Faiyaz Husain, Mukhtar, acted for Sarju and Lachhman in the proceedings before the Sub-Divisional Magistrate. Faiyaz Husain had been the opponent of Babu Krishen Deo Narain Singh in a Municipal election in which the latter was successful. The suggestion is that, in order to revenge himself for his disappointment, this Mukhtar has engineered all that part of the prosecution case which seems to cast discredit on the proceedings of the Honorary Magistrate. Dip Narain is supposed to have been implicated, *firstly*, in order to strike at Babu Krishen Deo Narain Singh through him ; *secondly*, because he refused to vote for Faiyaz Husain at the contested election ; and *thirdly*, because he refused to make a statement implicating Babu Krishen Deo Narain Singh at the inquiry before the Sub-Divisional Magistrate. This last is the point on which Dip Narain himself lays most stress, and in doing so he throws mud freely, not only at the Mukhtar Faiyaz Husain, but at the Sub-Divisional Magistrate himself. His allegations against this officer are wholly unsupported by evidence and we regard them as obviously false. His defence evi-

defence is directed towards proving that he had some ostensible business on April 17th in the Municipal Office which adjoins the Court of the Honorary Magistrates, and towards substantiating his story about the contested Municipal election. One witness also says that Mohammad Shafi owed Dip Narain money, a fact which Mohammad Shafi himself had in a fashion admitted. It is obvious enough that Mohammad Shafi would not obtain a release from his debt by getting Dip Narain sent to jail; and the whole of the defence evidence might be accepted, though some of it seems of very doubtful value, without really affecting our view of the case for the prosecution.

We are satisfied that the learned Sessions Judge has allowed himself to be wholly led astray in this case by a sort of belief that the prosecution was really directed against Babu Krishen Deo Narain Singh, and that Dip Narain could not be convicted unless the Court believed the allegations against that gentleman which are to be found in Mohammad Ishaq's confession, and nowhere else on the record. We hold it to be fully proved that Dip Narain was a party to the conspiracy which resulted in the filing of Salaran's false complaint.

We set aside the Sessions Judge's order of acquittal; we restore the Magistrate's order convicting Dip Narain on the charge under Sections 211-109 of the Indian Penal Code as framed. No special argument has been addressed to us on the subject of sentence, and we see no adequate reason for departing from the sentence originally passed by the trying Magistrate. We sentence Dip Narain to be rigorously imprisoned for one year and to pay a fine of Rs. 60, in default of payment of fine he will undergo further rigorous imprisonment for two months. He must surrender to his bail accordingly. Any period of imprisonment which he may have already undergone will count towards execution of the sentence now imposed.

Order modified.

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RICHARDS, C. J., AND PIGGOTT, J.

Puran Nath Sadhak—Petitioner-Appellant

Atwargir—Opposite Party-Respondent.

1915—A. 29

First Appeal No. 146 of 1914, decided on 19th March 1915, from an order of the Dist. J., Saharanpur.

Provincial Insolvency Act (3 of 1907), S. 4 (b) —Collusive decree for transferring possession is transfer of property within S. 4 (b).

A collusive suit and subsequent withdrawal from or compromising of the same, with the express object of putting another party in possession of immoveable property, amounts to a transfer of property by an insolvent within the meaning of clause (b) of Section 4 of the Provincial Insolvency Act, 1907. [P. 205, C. 2.]

Nihal Chand—for Appellant.

Judgment.—This is an appeal arising out of the dismissal of an application in insolvency. The applicant was a creditor of the respondent, Atwargir. The applicant alleged that the said Atwargir was indebted to him in a sum far exceeding Rs. 500, and further, that Atwargir had committed an act of insolvency by transferring certain property with intent to defeat the applicant's claim. It was alleged that the transfer was effected in the following manner: that Atwargir brought a collusive suit claiming certain property from one *Musamat Baldevi*, which suit he proceeded to compromise in such a manner that a decree might be passed having the effect of leaving *Musammot Baldevi* in possession of the property and preventing Atwargir from ever claiming the same from her. Or notice being issued to Atwargir, the latter presented an application admitting the debt set forth by the applicant and asking for an enquiry by the Insolvency Court. The District Judge has dismissed the application, holding that there has been no act of insolvency on the part of the debtor Atwargir. He has done this without any inquiry into the facts. He seems to have been of opinion that under no circumstances could the institution of a collusive suit and subsequent withdrawal from or compromising of the same, even though this transaction was carried out with the express object of putting another party in possession of immoveable property, amount to a transfer of property by an insolvent within the meaning of clause (b) of Section 4 of the Provincial Insolvency Act, III of 1907. We do not accept this view of the law. In our opinion the Court below should have made an enquiry into the facts alleged by the petitioner and should have disposed of the application in accordance with the result of that enquiry.

We set aside the order complained of and remand the case to the Court below.

with directions that it be re-admitted on to the file of pending applications and be disposed of on the merits. Costs of this appeal will be costs in the cause.

Order set aside; Case remanded.

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RAFIQUE, J.

Wazir Ahmad—Plaintiff-Appellant

v.

Daya Kishun—Defendant-Respondent.

Second Appeal No. 235 of 1914, decided on 27th January 1915, from the decision of the Sub-J., Budaun, dated 30th January 1914.

Occupancy tenant—Grove—Grove planted on occupancy land is not transferable.

Where an occupancy tenant plants a grove on his holding, he has no right of transfer in the trees. They cannot be sold privately or in execution of a decree against the tenants. *Case Law Ref. and 17 I. C. 656, A. I. R. 1914 Mad. 428 Dist.* [P. 207, C. 2.]

Abdul Raoof—for Appellant.

Damodar Das—for Respondent.

Judgment.—This appeal arises out of a suit brought by a *zemindar* for a perpetual injunction restraining the defendant from cutting down trees of a grove or otherwise interfering with his (*zemindar's*) possession over it. It was alleged in the plaint that Moulvi Wazir Ahmad, the plaintiff, was the *zemindar* of the village of Shitabnagar, and that Bhopal and others were his tenants in respect of plots, among others, numbered 74, 81 and 89. There was a mango grove on the said plots which was in the possession of Bhopal and others merely as his tenants, whose sole right in the grove was that of taking fruits. They had no right of transfer in respect of the trees of the grove nor could the said trees be sold in execution of a decree against them. One Daya Krishna in execution of his decree against them had some of the trees of the said grove put up to auction and purchased them himself on the 28th of June 1911. The said sale was void at law and put an end to the rights of the tenants in the grove and the plaintiff became entitled to its possession. He entered on possession but Daya Krishna, the purchaser, with the help of

two others attempted to cut down the trees purchased by him and was prevented by the plaintiff. The plaintiff, therefore, sued for perpetual injunction restraining Daya Krishna and his friends from cutting down any trees of the grove in question or otherwise interfering with the plaintiff's possession over the said grove. The claim was resisted on various grounds. The pleas with which we are concerned in this appeal were that the plots Nos. 74, 81 and 89 were granted to Debi Singh, ancestor of Bhopal and others, by the *zemindar* of the village for planting a grove and Debi Singh accordingly planted a grove and his descendants had a proprietary right in the grove which they could transfer either privately or which could be sold in execution of a decree against them. Moreover, under a custom obtaining in the village and also under the terms of the *Wajib-ul-arz* tenants have a transferable right in the trees in their possession. The learned Munsif held that the land of the grove in suit had not been granted to Debi Singh for planting a grove, but was his occupancy holding over which he had planted a grove. He further held that the custom set up for the defence was not proved and that the terms of the *Wajib-ul-arz* were not applicable to the present case. The claim was accordingly decreed. Daya Kishen, the auction-purchaser of the trees, preferred an appeal. The only point urged on his behalf before the learned Subordinate Judge was that under the terms of the *Wajib-ul-arz* of the village of Shitabnagar tenants had a transferable right in the trees planted by them. In order to dispose of the question raised in the appeal the learned Subordinate Judge framed a fresh issue and remitted it for trial to the first Court. The finding of the first Court on the fresh issue did not support the contention of the appellant that under the terms of the *Wajib-ul-arz* a tenant had a right of transfer in the trees planted by him on his holding. The learned Subordinate Judge accepted the finding of the first Court, but for the other reasons held that the tenants of the grove in suit had a right of transfer in the trees. He accordingly accepted the appeal and dismissed the claim of the plaintiff. The latter has come up in second appeal to this Court. He contends that an occupancy or non-occupancy tenant who plants trees on his holding has

no right of transfer in the trees in the absence of a custom or contract to the contrary. The following cases are relied upon in support of this contention : *Kasim Mian v. Banda Husain* (1); *Imdad Khatun v. Bhagirath* (2); *Kausalia v. Gulab Kuar* (3); *Janki v. Sheodhar* (4); *Wahida Khatun v. Bulqi Das* (5).

For the respondent the reply is that the finding of the lower Appellate Court is that the land of the grove in suit was given to Debi Singh on a fixed rent for the purpose of planting a grove and, therefore, the principle laid down in the cases relied upon by the appellant does not apply. It is said that when a *zemindar* grants land on rent to a person to plant a grove, that person has a right of transfer in the trees. In support of his argument the respondent refers to the following cases :—

Muhammad Ismail Khan v. Mithu Lal (6); *Habibullah v. Kalyan Das* (7).

The case-law, no doubt, makes a distinction between the rights of a tenant, occupancy or non-occupancy, who plants trees on his holding and of a person who is given land at a specified rent solely for the purpose of planting a grove. The contention of the respondent must prevail if it has been found that the land of the grove in suit was granted to Debi Singh for the purpose of planting a grove. It is true that the learned Subordinate Judge does say that he thinks that the land of the grove in suit was let to Debi Singh on a fixed rent for the purpose of planting a grove. But there does not seem to be any evidence in support of this finding. The defendant-respondent produced evidence to prove that the plaintiff-appellant had granted the land of the grove in suit to Bhopal and others who had planted the grove. The first Court disbelieved that evidence. The learned Subordinate Judge did not accept it also, for he holds that the land was granted to Debi Singh. He means presumably that the land was granted by the former *zemindars*, as the plaintiff-appellant was not the *zemindar* in the life-time of Debi Singh. In fact

the learned Subordinate Judge, in an earlier part of his judgment, accepts the finding of the first Court that the grove in question was planted with the permission of the former *zemindar*. The revenue papers show that the land of the grove was the occupancy holding of Debi Singh for a long time before any trees were planted by him on it. The reason for the finding seems to be that the learned Subordinate Judge thought that the permission of the former *zemindars*, which was assumed in the absence of any protest by them, to Debi Singh to plant a grove amounted to the grant of a fresh lease to him of the land for the purpose of planting a grove. If that were a valid reason the cases referred to above by the appellant were erroneously decided. But I do not think that it can be said that the permission by a *zemindar* to his occupancy or non-occupancy tenant to plant trees on his holding cancels the original lease and is a fresh lease for the purpose of planting trees. The finding under discussion being unsupported by any evidence cannot be accepted. The character of the grove in question then is that it was planted by an occupancy tenant on his holding. He or his successors have, therefore, no right of transfer in the trees. They cannot be sold privately or in execution of a decree against Bhopal and others. But it is further contended for the respondent that as soon as the grove was planted by Debi Singh the land lost its character as an occupancy holding and the *zemindar* could have ejected him. The *zemindar* having failed to do so Debi Singh became a trespasser and his possession became adverse to the *zemindar*. Debi Singh and his successors have been in adverse possession for more than twelve years prior to the sale of the trees, and hence the plaintiff-appellant cannot question the sale to Daya Kishen. No such plea was taken by the latter in his defence. But apart from that, the case of Daya Kishen was and the finding of the lower Court is that the trees were planted with the permission of the former *zemindars*. No question of adverse possession can, therefore, arise. The appeal prevails, the decree of the lower Appellate Court is set aside and that of the first Court is restored. Costs are allowed to the appellant throughout.

Appeal allowed.

(1) [1883] 5 All. 616=(1883) A.W.N. 169.

(2) [1888] 10 All. 169=(1888) A.W.N. 33.

(3) [1899] 21 All. 297=(1899) A.W.N. 72.

(4) [1901] 23 All. 211=(1901) A.W.N. 52.

(5) [1906] 3 A.L.J. 385=(1906) A.W.N. 140.

(6) [1912] 17 I.C. 656.

(7) A.I.R. 1914 All. 428=25 I.C. 169.

A. I. R. 1915 Allahabad 208

RAFIQUE, J.

Kishen Ballabh—Defendant—Appellant

v.

Ghure Mal and another—Plaintiffs—Respondents.

Second Appeal No. 257 of 1914, decided on 8th February 1915, from the decision of Sub J., Muttra.

Negotiable Instruments Act (26 of 1861). S. 118 (a)—*Presumption of consideration does not arise when plaintiff tries and fails to prove consideration.*

Under the *Negotiable Instruments Act* it must be presumed that when a *Hundi* was drawn some consideration did pass, unless rebutting evidence is given as to its failure. But if the plaintiff himself chose to give evidence at the first instance as to consideration which was disbelieved by the Court, no such presumption arises.

[P. 208, C. 2.]

Kailas Nath Katju for *S. K. Dar*—for Appellant.

K. N. Laghate for *Benode Behari*—for Respondents.

Judgment.—This appeal arises out of a suit brought by Ghure Mal, the plaintiff-respondent, for the recovery of Rs. 565 13-4 on the basis of a *hundi* dated August 23rd, 1910. It was alleged in the plaint that one Kanhaiya Lal had drawn the *hundi* in suit on a Bombay firm in favour of Kishen Ballabh and his son Baldeo for Rs. 500, who had sold it to the plaintiff for the same amount. The plaintiff presented the said *hundi* to the Bombay firm and it was dishonoured. Subsequent to the dishonour of the *hundi* by the Bombay firm the plaintiff called upon Kishen Ballabh and Baldeo to discharge it, who made promises from time to time but failed to pay the money due on it. Hence the plaintiff sued both father and son for the recovery of Rs. 500 principal and Rs. 65-15-4 interest at six per cent per annum. The claim was decreed *ex parte* on April 16th, 1913, against Kishen Ballabh but was dismissed against Baldeo. On May 3rd, 1913, Kishen Ballabh applied to have the *ex parte* decree against him set aside and his application was allowed on May 24th, 1913. He denied the claim and pleaded that Kanhaiya Lal had not drawn the *hundi* in suit in his favour and that he, Kishen Ballabh, had not endorsed the *hundi* to the plaintiff and had received no consideration on it.

The learned Munsif of Mahaban, in whose Court the suit was filed, yielded to the pleas in defence. He held that it had not been proved that Kanhaiya Lal had drawn the *hundi* in suit or that Kishen Ballabh had endorsed it to the plaintiff or had received any consideration on it. The claim was accordingly dismissed. The plaintiff preferred an appeal which was disposed of by the learned Subordinate Judge of Muttra. The latter disagreed with the first Court as to the sale of the *hundi* in suit to the plaintiff by Kishen Ballabh. He held that the evidence before him proved the sale of the *hundi*. He agreed with the first Court that the plaintiff had failed to prove the passing of full consideration, but in his opinion some consideration did pass on it, probably Rs. 125, but could not say for certain how much. However, as under the *Negotiable Instruments Act* it must be presumed that the *hundi* in suit was transferred for consideration and no rebutting evidence was given by Kishen Ballabh as to the failure of part of the consideration, the claim of the plaintiff must prevail. The learned Subordinate Judge accordingly accepted the appeal and decreed the claim, Kishen Ballabh in his appeal to this Court challenges the decree against him on three grounds. He says that it has not been proved that Kanhaiya Lal drew the *hundi* in suit or that the appellant sold it to the plaintiff. Under the circumstances of the present case, as found by the lower Appellate Court, no presumption arises in favour of the passing of consideration. Moreover it was not necessary for the appellant to give evidence in rebuttal on the question of consideration, as the plaintiff had himself led the evidence on the point and it was disbelieved. In support of the first objection it is said that the finding of the lower Appellate Court is that Kanhaiya Lal is a wealthy spendthrift in whose service the appellant has enriched himself with the help of the plaintiff, who holds many *hundis* from Kanhaiya Lal. The *hundi* in suit was possibly fabricated by the plaintiff to cheat Kanhaiya Lal. And if the appellant was perhaps a party to the fraud in endorsing it to the plaintiff, no decree should be awarded on such a *hundi*. The appellant did not state in his defence that he and the plaintiff had fabricated the *hundi* in

suit to cheat Kanhaiya Lal. The suggestion thrown out in the argument now cannot be accepted. It is true that he did not admit that the *hundi* in suit was drawn by Kanhaiya Lal, but he gave no evidence in support of it. If he himself fabricated the *hundi* without the knowledge of the plaintiff and sold it to the latter, he, the appellant, is liable under it. He, however, denies the sale of the *hundi* to the plaintiff and contends that there is no legal proof in support of the alleged sale. The plaintiff went into the witness-box and swore that the *hundi* in suit had been sold to him by the appellant. He produced two witnesses who gave evidence to the same effect. A letter was also produced purporting to be written by Baldeo, the son of the appellant, asking Kanhaiya Lal to pay the *hundi* in suit. The learned Munsif disbelieved the plaintiff and his witnesses and while admitting the genuineness of the latter, explained it by saying that the plaintiff had procured it "on some pretence." The learned Subordinate Judge, however, accepted the evidence for the plaintiff in view of the letter of Baldeo and the resemblance of the admitted signatures of the appellant to his signature on the endorsement on the *hundi*. I think that the learned Subordinate Judge acted on legal evidence and his finding, being one of fact based on evidence, cannot be questioned.

The third objection for the appellant in my opinion must prevail. If no evidence had been given by the plaintiff, the presumption that arises in favour of a negotiable instrument with regard to the passing of consideration would have held good. But plaintiff chose to open the case and lead evidence as to the passing of consideration. Both the Courts have disbelieved that evidence. The learned Subordinate Judge holds that some consideration must have passed, because in the *ex parte* trial one of the witnesses for the plaintiff said that Rs. 125 had been paid to Kanhaiya Lal. In the present case the evidence of that witness cannot be taken into consideration and an inference drawn that some consideration passed on the *hundi* in suit to the appellant. Besides the assumption that some consideration passed on the *hundi* in suit to the appellant would not warrant a decree for the full amount. As the amount paid to the appellant, if any,

has not been proved the claim of the plaintiff must fail. I allow the appeal, set aside the decree of the lower Appellate Court and restore that of the first Court. Costs are allowed to the appellant against the plaintiff-respondent.

Appeal allowed.

A. I. R. 1915 Allahabad 209

CHAMIER and PIGGOTT, JJ.

Mohammad Ahmad Said Khan—Defendant-Appellant

v.

Masih ul-lah Khan—Plaintiff-Respondent.

Second Appeal No. 731 of 1914, decided on 27th January 1915, from the decree of Dist. J., Aligarh.

Evidence Act, (1 of 1872), S. 43—*Judgments not inter partes are in certain circumstances admissible.*

Z was in possession as mortgagee of a six annas share belonging to R in a certain village. During the continuance of the mortgage Z executed a lease of the property in favour of A. Subsequently R executed a simple mortgage in favour of A and covenanted that the usufructuary mortgage in favour of Z should be paid out of its consideration. This was done and the mortgage in favour of Z was redeemed. Nevertheless A's name continued to be recorded as lessee in respect of the property. On the strength of the entry in the papers, A brought a suit for profits against M, the *lambardar*, and obtained a decree. M thereupon sued A for a declaration that the mortgage of Z having been redeemed, A was not entitled to the decree for profits and that the entry of his name as lessee was erroneous. A defended the suit on the ground that by an arrangement between him and R, he was left in possession of the property as lessee for the remaining period of the lease and that he had been made to account to R in a suit between them on the simple mortgage for the very year for which he had obtained the decree for profits against M. He produced the judgment between himself and R to prove his allegation.

Held, that the judgment produced by A was admissible in evidence under section 43 of the Evidence Act. [P, 210 C, 2, P, 211, Col. 1.]

Iqbal Ahmed and Motilal Nehru—for Appellant.

S. M. Sulaiman and B. E. O'Connor—for Respondent.

Judgment.—These are two connected second appeals arising out of the same series of transactions. They may be disposed of by a single judgment, the facts in both cases being substantially the same. The respondent, Mohammad Masih-ul-lah Khan, who is the plaintiff in both suits, is the *lambardar* of a certain *mahal*. In that *mahal* there was a share of six annas belonging to one Rafeat Khan and a share of two annas belonging to *Musummat*

Zohra Begam. At one time Zohra Begam was also in possession as sub-mortgagee of the six annas share belonging to Rafaat Khan. While thus in possession she leased out to the defendant-appellant, Ahmad Said Khan, the right to receive the profits of the entire share of eight annas, that is to say, of her own share of two annas *plus* Rafaat Khan's share of six annas. Subsequently Rafaat Khan executed a simple mortgage of his own six annas share to Ahmad Said Khan aforesaid, making it part of the covenant, that the existing usufructuary mortgage should be redeemed out of the consideration for the said simple mortgage. This was done, and in consequence of this redemption the rights of Zohra Begam over Rafaat Khan's six annas share terminated. Nevertheless Ahmad Said Khan continued to be recorded as lessee in possession of the entire eight annas share. He brought suits for profits in the Rent Court on the strength of this entry, and the matter was litigated up to this Court, terminating in a decision which will be found reported as *Ahmad Said Khan v. Masiullah Khan* (1). This Court held that, inasmuch as the Revenue Records showed Ahmad Said Khan to be the person entitled to receive the profits claimed by him during the years in suit, a decree must be passed in his favour. The suits now before us are brought in consequence of this decree. Muhammad Masih-ul-lah Khan claims that he is in a position to prove that the entries in the papers which showed Ahmad Said Khan as lessee of the six annas share belonging to Rafaat Khan, were incorrect. He seeks relief by way of a declaration to this effect, a further declaration that Ahmad Said Khan was not entitled to receive the profits decreed in his favour by the Rent Court, and also that the decrees obtained by Ahmad Said Khan are incapable of execution. With regard to the form of the reliefs claimed, it is perhaps open to argument that the last relief sought should rather have been a perpetual injunction restraining Ahmad Said Khan from executing those decrees, but this is a matter of form rather than of substance, and in the view we take of the case as a whole it is not necessary for us to go into it. The Court of first instance dismissed the claim on various grounds, but

it has been decreed by the learned District Judge in appeal. Coming to this Court in second appeal Ahmad Said Khan principally contends that the decision of the learned District Judge has been arrived at by excluding important evidence tendered by him as defendant, and practically by preventing him from establishing the defence which he set up on the merits. When the usufructuary mortgage on Rafaat Khan's six-annas share was redeemed, the right of Ahmad Said Khan to continue in possession as a lessee undoubtedly terminated, but it was for the proprietor, that is to say, for Rafaat Khan, to take whatever steps were necessary in order to enforce his right to possession over his own share. Now the case for Ahmad Said Khan is that, so far from doing this, Rafaat Khan entered into an arrangement with him by which he was allowed to continue in possession as lessee for the unexpired portion of his lease, on condition that whatever sums he received from the *lambardar* on account of the profits of his share should be credited towards payment of the money due to him from Rafaat Khan on the simple mortgage. This is a defence which it was clearly open to Ahmad Said Khan to set up, and it appears to us that the learned District Judge has misconceived the nature of the defence and has excluded the evidence by which that defence is fairly proved.

We find that there has been a litigation between Rafaat Khan and Ahmad Said Khan in respect of the simple mortgage, which litigation terminated in a judgment and decree of this Court dated May 24th 1911. The result of that litigation was that Ahmad Said Khan was held to have been in possession and enjoyment of the profits of this six annas share during the years in question in the present suit, and was made to account for the profits of the share to Rafaat Khan, that is to say, in the decree which was given to Ahmad Said Khan on his mortgage as against Rafaat Khan these profits were credited in part payment of the mortgage-debt. The judgment in question was not a judgment *inter partes* so far as the present suit is concerned and, therefore, the District Judge thought that it was altogether inadmissible. Now under Section 43 of the Indian Evidence Act a judgment not *inter partes* may be admissible if its existence is otherwise a fact in issue or a

relevant fact under some other provision of the Indian Evidence Act. In the present case Ahmad Said Khan's whole defence was that he was left in possession as lessee by the only person who had a right to eject him, and further that he was made to account to that person for the very profits decreed in his favour by the Revenue Court in the decrees which it was the object of the present suit to set aside. The judgment in the suit between Ahmad Said Khan himself and Rafaat Khan was just as much relevant for the purpose of proving these facts as would have been a receipt in favour of Ahmad Said Khan signed by Rafaat Khan. It was positive evidence of the most conclusive kind that Ahmad Said Khan did actually pay those profits to Rafaat Khan. It seems to us on these grounds that the finding of the learned District Judge cannot be sustained, and that the Court of first instance was right in dismissing these suits.

It has been contended before us that, as a matter of fact, if further enquiries were made into the question in issue, it would be found that Masih-ul-lah Khan as *lambardar* has actually paid these profits, or some portion of them, to Rafaat Khan direct. This argument is sought to be based on certain passages in the judgment of the lower Courts in the litigation between Ahmad Said Khan and Masih-ul-lah Khan, which terminated in this Court's decree awarding Ahmad Said Khan the profits claimed by him. There is, however, on the record of this present suit no evidence whatever to show that Masih-ul-lah Khan really paid Rafaat Khan any profits on account of the years now in question. It seems to us highly improbable that he did so. According to the Revenue Records the person entitled to these profits was Ahmad Said Khan, and we should require cogent evidence to convince us that while the record stood thus, the *lambardar* went out of his way to pay the profits to Rafaat Khan. In any case if there has been dishonesty on the part of Rafaat Khan in recovering these profits, or some portion thereof, twice over, that is to say, once from the *lambardar* direct and again from Ahmad Said Khan, that is a matter which may be put right by a further litigation to which Rafaat Khan would be a necessary party. We are, therefore, of opinion that these appeals must prevail. We set aside the decree of the lower Appellate Court

in each case and restore that of the Court of first instance. The plaintiff must pay the defendant's costs in all Courts.

Appeal allowed.

A.I.R. 1915 Allahabad 211

TUDBALL AND RAFIQUE, J.J.

Ibrahimji—Decree-holder—Appellant
v.

Hasanuddin Khan—Judgment-debtor—Respondent.

Exe. Second Appeal No. 828 of 1914, decided on 17th February 1915, from the decision of the Dist. J., Shahjahanpur, dated 6th March 1904

(a) *Limitation Act* (9 of 1908), Art. 182 (5)—*Limitation begins to run from the date of application to take step in aid and not from the date it is ordered.*

Under Article 182 (5) of the Limitation Act, the period of limitation begins to run from the date on which application is made to take a step-in-aid of execution and not from the date on which, the Court actually takes the step. [P. 212, C. 2.]

(b) *Limitation Act* (9 of 1908), S 15—*Agreement of parties not acted on and without Court's order does not save limitation.*

A judgment-debtor applied to be declared an insolvent. In the course of the proceedings the Pleader for the decree-holder, who was one of the creditors, stated that if the judgment-debtor would withdraw his application in insolvency he would guarantee not to apply for his arrest in execution of his decree for a period of two years. To this the judgment-debtor consented and the application was struck off. A warrant of arrest was, however, issued by the Court, but was returned unserved as the necessary diet money was not paid:

Held, that the agreement could not save the period of limitation from running against the judgment debtor, inasmuch as the decree-holder did not abide by the agreement and neither there was any order suspending the execution or injunction nor did the agreement prevent the decree-holder from applying for execution. [P. 212, C. 2.]

Agha Haider—for Appellant.

Iqbal Ahmed—for Respondents.

Facts.—The appellant obtained a decree on the 30th of November 1908. He applied for execution of the decree on the 17th of February 1909 and again on the 11th of March 1910. The prayer in the latter application was for the arrest of the judgment-debtor. On this, the judgment-debtor applied to the District Judge for being declared an insolvent. During the insolvency proceedings the decree holder's Pleader stated that if the judgment-debtor would withdraw his application, he would not apply for two years for his arrest in execution of his decree. The judgment-debtor consented to this and the insolvency

petition was struck off. The decree-holder applied for execution of the decree on May 3rd, 1913, and the judgment-debtor resisted execution on the plea that it was barred by time. The first two Courts dismissed the application and the decree-holder appealed to the High Court.

Judgment.—The decree in the present case was obtained on November 30th, 1908. The first application for execution was made on February 17th, 1909. It was dismissed for default of prosecution. On March 11th, 1910, a second application was made by the decree-holder for execution by arrest of the judgment-debtor. Thereupon the judgment-debtor applied to the District Judge to be declared an insolvent. In the course of the insolvency proceedings on May 14th, 1910, the Pleader for the decree-holder, who was one of the creditors, stated that if the judgment-debtor would withdraw his application in insolvency he would guarantee not to apply for his arrest in execution of his decree for a period of two years. To this the judgment-debtor consented and the District Judge struck off the application for insolvency. This was on May 14th, 1910. The execution application of March 11th, 1910, was still pending and on May 18th, 1910, the decree-holder's Pleader again attended Court and the Munsif directed that a warrant of arrest should issue. It is clear that a warrant of arrest was issued, but that it was returned unexecuted by the Nazir because the decree-holder failed to pay the necessary diet money. It will be noted also that the decree-holder's Pleader on this date called the attention of the Court to the fact that the necessary fees for the arrest of the judgment-debtor were in deposit in Court. The present application for execution was made on May 3rd, 1913. It has been held by the Courts below to be out of time and the decree-holder comes here in second appeal. The first plea raised is that the application of March 11th, 1910, is still pending and that this is merely a continuation of those proceedings. This in view of the order of the Munsif, dated June 2nd, 1910, striking off the application by reason of the decree-holder's default of payment of the necessary diet money and of the contents of the present application itself, can have no force whatsoever. The

present application is an application for execution. It is not an application tendering diet money and asking the Court to go on with the former proceeding.

The next plea raised is that the present application is within three years of May 13th, 1910, the date on which the Munsif directed the issue of a warrant of arrest. It is urged somewhat lamely that the decree-holder's Pleader must on that day have orally asked the Court to issue a warrant of arrest and, therefore, an oral application must have been made to take a step-in-aid of execution. There is no evidence on the record at all to prove that any such oral application was made and we cannot presume it.

It is next sought to persuade us to hold that the meaning of Article 182, clause 5, of the Schedule to the Limitation Act is that the time from which the period begins to run is not the date of the application to the Court to take a step-in-aid of execution, but the date on which the Court actually takes the step. We fail to see that this clause means anything else but what the plain language thereof shows it to mean. The wording is, "where the application next hereinafter mentioned has been made, the date of applying etc., etc." Lastly it is said that by reason of the agreement of May 14th, 1910, the decree-holder is entitled to credit for the two years following that date. In the first place the decree-holder did not abide by that agreement, for on the 18th of May the Court issued a warrant of arrest. Moreover Section 15 of the Limitation Act does not apply, for there was no order for suspension nor was there any injunction; there was no reason why the decree should not have been executed in any other manner than by the arrest of the judgment-debtor; and lastly that agreement did not prevent the decree-holder from applying within the period of limitation for execution. In our opinion the orders of the Courts below are perfectly correct. There is no force in this appeal. It is, therefore, dismissed with costs, including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 233

KNOX, J.

Muhammad Hasan Askari—Decree-holder-Appellant

v.

Niaz Husain and others—Judgment-debtors—Respondents.

Ex. Second Appeal No. 1119 of 1914, decided on 25th February 1915, from the decision of the Sub-J., Allahabad.

Civil P. C. (5 of 1908), S. 38—Execution—Construction of decree—Executing Court cannot complete or construe a decree—Execution.

Where a decree is incomplete and ambiguous, it is not the duty of the Court executing the decree to complete it and to give a definite expression to the ambiguity. Case Law Ref.

[P. 234, C. 1.]

Abdul Raof for Rahmat Ullah—for Appellant.

Tej Bahadur Sapru—for Respondents.

Judgment.—The Munsif of Allahabad passed a decree in the following terms : "It is ordered and decreed that the plaintiff's claim, for pre-emption, be dismissed with costs as against all the defendants with the exception of defendants Nos. 5 and 6, that the plaintiff's claim for pre-emption, in respect of the shares of defendants Nos. 5 and 6, if any in the property in dispute, be decreed; and that if the plaintiff deposits for payment to defendants Nos. 5 and 6, within one year from this date, the proportionate amount of the consideration money, equal to the price of the shares of defendants Nos. 5 and 6, with reference to the entire consideration money, Rs. 780, specified in the sale-deed, then on his so depositing the aforesaid money, he (the plaintiff) shall be entitled to get possession over the shares of defendants Nos. 5 and 6, if any, in the property in dispute."

That decree was neither taken into appeal nor has it in any way been altered since it passed.

The decree-holder applied to execute the decree, and in his application he asks that he may be put into actual and formal possession of the shares in the *zemindari* property sought to be pre-empted, being the share of *Musammât Sakina Bibi* and *Kaniz Bano Bibi* specified below. He then goes on to say that under the orders embodied in the decree, he had deposited in Court Rs. 102-14-9, and he sets out, as the share over which he asks to be put in possession, a share amounting to 17

karants in *Mauza Manauri*, *Patti Hub-bun-nisa*, *Pargana Chail*.

The Munsif of Allahabad, in whose Court this application was filed, at once found himself face to face with objections. These objections were several in number. One of them was that the decree-holder sought to execute the decree not against the property of *Sakina Bibi* and *Kaniz Bano Bibi*, but against the property of the heirs of *Abid Husain*; and further that the ladies above-mentioned had no interest in the property pre-empted, this share had not been set apart or specified in the decree; also that their share could not be determined in the execution department and the decree was not a decree which could be executed.

The learned Munsif went into the questions raised and the nature of the questions which he had to determine will be seen from the issues which he framed. He set himself to decide whether a Muhammadan father or a Muhammadan son had died first? Whether certain shares had been transferred before the pre-emption by an award of arbitrators? Whether an application to have the award filed in Court was rejected? Whether the proportionate amounts of consideration which the decree-holder had to pay, were matters to be considered in execution proceedings?

After wading through these troubled waters he arrived at the conclusion that the plaintiff was entitled to a decree for possession over 125 *sihams* out of 1152 *sihams* of the whole property inherited by these ladies provided the pre-emptor deposited Rs. 84-10-2 within a certain time. One has only to contrast the decree passed by the Munsif of Allahabad on the 31st of January 1911 with the order passed by the Munsif of Allahabad on the 3rd October 1912, to see that the real decree in the suit was that passed on the 3rd of October 1912 and not that passed on the 31st January 1911. The decree passed in January 1911 was not an adjudication conclusively determining the rights of the parties with regard to matters in controversy between the parties in suit, it left many of those matters undecided and the decree-holder, armed with the decree of the 31st January, had a decree which the learned Subordinate Judge, before whom the matter went in appeal afterwards found incapable of execution.

The appeal before me contests the finding of the Subordinate Judge, and says that that Court was in error when it held that the decree passed in January was a decree incapable of execution. The learned Counsel for the decree-holder in support of the first plea taken by him in appeal, *i.e.*, that the decree in question was a decree capable of execution, cited in support of his argument the case of *Pirbhu Narain Singh v. Rup Singh* (1). The decree before the Court in that case was a decree for sale of property in which the decree-holder and the Courts were at arm's length as to whether the decree gave or did not give the decree-holder interest after a certain date. This Court held that the decree was clear and unambiguous on this question and that the executing Court was bound to execute it according to its terms.

I was next referred to the case of *Liladhar v. Chaturbhuj* (2). That was a case in which the Court executing the decree took upon itself to decide whether the decree, as it stood, was or was not a valid decree, whether it was or was not rightly passed. In both cases the Courts had before them a decree and there can be no question that when a Court is asked to execute a decree, its business is to execute that decree according to the terms contained in the decree and not to question whether the decree was a decree passed by a Court having jurisdiction or whether some of the terms of the decree had not been erroneously entered in the decree. What the Court did in this case was to take up an incomplete decree, the terms of which were ambiguous, and to proceed to complete the decree and to give a definite expression to the ambiguity. I know of no provision of the Civil Procedure Code which allows the executing Court to do this.

The case before me seems to be in accord with the case of *Ram Lait Ram v. Ohooram* (3). That was a decree passed under a *sulehnama* and the Court passed its decree blindly on the *sulehnama* without ascertaining matters which had been left unascertained by the *sulehnama*. As the learned Judges pointed out, disputes naturally arose when the decree was put into execution, and they held that a Court

executing the decree was bound by the terms of the decree and it was only in cases provided for by Sections 211 and 212 of the Civil Procedure Code then in existence (now Order XX, Rule 12) that the Court is at liberty to determine the rights of litigants in proceedings taken after decree. As regards those rights the Calcutta High Court held that they could not in execution go into the question at all. The result is that this appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 234

RICHARDS, C. J. AND BANERJI, J.

Ganges Sugar Works Ltd.—Plaintiff—Appellant

v.

Nuri Miah—Defendant—Respondent.

First Appeal No. 31 of 1914, decided on 17th February 1915, from the decision of the Sub-J., Cawnpore, dated 22nd December 1913.

Companies Act (7 of 1913), S. 93—*Agreement to refer dispute to arbitrators without company's seal is not invalid.*

A contract to refer to arbitration any dispute which might arise between a Company and an individual is not illegal because it is not under the seal of the Company. [P. 236, C. 1]

Wallach—for Appellant.

S. C. Banerji—for Respondent.

Judgment.—The facts connected with the case out of which this appeal arises are shortly as follow. The plaintiff Company entered into a contract with the defendant in connection with the working of a certain portion of the Company's property or business. One clause of this contract was that in the event of disputes or differences arising, they should be referred to the arbitration of a gentleman named Hazari Lal, and that his decision should be binding and conclusive between the parties. This contract was not under seal. Disputes having arisen the Company made an application under Schedule II, Rule 17, of the Code of Civil Procedure to file the contract as a submission to arbitration in order that the matter should be settled in accordance with the provisions of the Code. This application was refused by the Court below on the sole ground that the contract which contained the submission to arbitration was not under the seal of the Company. At present we have nothing to do with the merits

(1) (1898) 20 All. 397=1898 A.W.N. 91.

(2) (1899) 21 All. 277=1899 A.W.N. 64.

(3) (1879) 4 C. L. R. 97.

of the dispute between the parties. We have only to decide whether or not the Court below was wrong in refusing the application on the ground mentioned above. Section 67 of the Indian Companies Act, VI of 1882, (which was in force at the time), provides for the manner in which contracts can be entered into by Companies. It is admitted by both sides that the present contract, save the particular clause which refers to arbitration), was a contract which the Company was entitled to enter into without its being under seal. It is quite clear that if Section 67 stood alone, the contract to refer to arbitration also did not require to be under seal. It is contended, however, that it necessarily follows from the provisions contained in Section 96 and the subsequent sections down to Section 123 that an agreement to refer disputes to arbitration by a Company to be legal must necessarily be under seal. Section 96* is as follows: "Any Company under this Act may from time to time, by writing under its common seal, agree to refer, and may refer, to arbitration any matter whatsoever in dispute between itself and any other Company or person; and the Companies, parties to the arbitration, may delegate to the person or persons, to whom the reference is made, power to settle any terms or to determine any matter capable of being lawfully settled or determined by the Companies themselves, or by the Directors or other managing body of such Companies."

This Section (96) is largely taken from the English Companies Act (25 and 26 Victoria, Chapter 89), Section 72* of which is as follows: "Any Company under this Act may from time to time, by writing under its common seal, agree to refer and may refer to arbitration, in accordance with the Railway Companies Arbitration Act, 1859, any existing or future difference, question or other matter whatsoever in dispute between itself and any other Company or person, and the Companies parties to the arbitration may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the Companies themselves or by the

Directors or other managing body of such Companies".

Section 73* is as follows: "All the provisions of the Railway Companies Arbitration Act, 1859, shall be deemed to apply to arbitrations between Companies and persons in pursuance of this Act; and in the construction of such provisions the Companies shall be deemed to include Companies authorised by this Act to refer disputes to arbitration."

The Railway Companies Arbitration Act, 1859, was an Act providing for the settlement of disputes between Railway Companies *inter se*. It contains more or less elaborate provisions for the manner in which such arbitrations should be carried out. The provisions, to which we have referred, of the English Companies Act incorporated these provisions and made them applicable not only to disputes between different Companies, but also to disputes between a Company and an individual. It was evidently the intention of the Indian Legislature to do much the same thing by the Indian Companies Act of 1882. Sections 97-122 are for the most part adaptations of the Railway Companies Arbitration Act to which we have already referred. It was neglected, however, to expressly make these sections applicable to disputes between Companies and individuals. It seems as if there was an example of clumsy drafting, but the matter is no longer of any very great importance because under the present Indian Companies Act, VII of 1913, provision is made for Companies entering into arbitration in accordance with the Indian Arbitration Act. It seems to us that the question resolves itself into the proposition, do the provisions of Section 96 necessarily imply that a Company cannot, save under seal, enter into a contract to refer, a contract which but for the provisions of the section it could have entered into, namely, to submit its possible future disputes to the arbitration of a named arbitrator? It seems to us that there is no such necessary implication. The words are that "the Company may from time to time" etc. It was probably the intention of the Legislature when providing for the method in which a particular arbitration should be carried out to give the parties the option of having the arbitration in accordance with the Act, if

* See Section 119 of the Companies (Consolidation) Act, 1908.—*Ed.*

they thought fit. It is, however, unnecessary now to speculate as to what was the real intention from the change that has been made in the law; the provisions of the Act of 1882 evidently were found to be inapplicable to the conditions of this country. We think that the contract in the present case to refer to arbitration any future disputes which might arise between the Company and the defendant was not an illegal contract but a contract which can be given effect to in the ordinary way. It is quite clear that Section 123 only applies to submissions to arbitration which have been made in accordance with the provisions of the Act.

We accordingly allow the appeal, set aside the decree of the Court below and remand the case to that Court with directions to re-admit it upon its original number in the file and to proceed to hear and determine the same according to law, having regard to what we have said above. Costs here and heretofore will be costs in the cause and will include fees on the higher scale. The record may be sent down so that the Court below may dispose of the case as soon as possible.

Appeal allowed; Case remanded.

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RAFIQUE, J.

Ramjas Mal—Defendant—Appellant

v.

Zaharya Singh—Plaintiff—Respondent.

Second Appeal No. 1445 of 1913, decided on 8th February 1915, from the decision of the Sub. J., Meerut, dated 7th July 1913.

U. P. Land Revenue Act (3 of 1901), S. 118—Co-sharer's house included in share of another in partition without any settlement—Possession of site by removing materials can be claimed.

Where the site of a house belonging to one co-sharer is given to another co-sharer at the time of partition and no step is taken under Section 118 of the U. P. Land Revenue Act to enable the occupier of the house to retain possession of the house on payment of rent, the co-sharer to whom it is allotted at the partition can recover possession of the site by removal of the materials of the house. 5 I. C. 664 Ref. [P. 237, C. 1.]

Gokul Prosad—for Appellant.

Tej Bahadur Sapru—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiff-respondent for the recovery of possession of *abadi* plot No. 53/1 and the house situate on it. The facts as found by the Courts below are

that Sonehra, Hardeo and *Musammat* Indraoti were the owners of the house in suit and co-sharers in the village. In 1870 the ancestors of Sonehra, Hardeo and *Musammat* Indraoti mortgaged their *zemindari* as also the house in suit to Ram Lal, the grandfather of the plaintiff-respondent. The mortgage was with possession, but the mortgagors took the house on lease from the mortgagee. In 1897 Sonehra and his father, Moti, sold their equity of redemption to the defendant-appellant in respect of their *zemindari* share, who redeemed the mortgage. In 1904 there was a partition effected through Court between the co-sharers of the village under which *abadi* plot No. 53/1 was allotted to the plaintiff-respondent. At the time of the partition Sonehra and *Musammat* Indraoti were occupying the house in suit. They did not ask the Collector to make an order under Section 118 of the Land Revenue Act enabling them to retain possession of the house on payment of rent. Subsequently in 1909 Sonehra and *Musammat* Indraoti executed a sale-deed in respect of the house situate on plot No. 53/1 in favour of the defendant-appellant. The vendors, after selling the house, left the village. The plaintiff-respondent, after their departure finding the defendant-appellant in possession of the house in question, brought the suit out of which this appeal has arisen for the possession of the house and its site, on the allegation that he was the proprietor of the site under the partition of 1904 and of the house because Sonehra and *Musammat* Indraoti, whom he described as tenants, had left the village. The claim was resisted on the ground among others that Sonehra and *Musammat* Indraoti were not tenants in the village, but were co-sharers who had proprietary rights in the house in suit. The learned Munsif in whose Court the suit was filed dismissed the claim for possession, but declared the plaintiff to be the owner of the site. On appeal the learned Subordinate Judge reversed the decree of the first Court and decreed the claim of the plaintiff for actual possession of the site giving the defendant an option to remove the materials within a specified time. The defendant has come up in second appeal to this Court and contends that as the plaintiff has failed to prove that Sonehra and *Musammat* Indraoti were mere tenants on whose

departure the house and its site escheated to him, his claim for possession must fail. The defendant admits the title of the plaintiff to the site and is willing either to pay rent for it or to give other land of equal value in exchange to the plaintiff. I think that the decree passed by the lower Appellate Court is a correct decree in view of the decision of this Court in *Nandan Pat Tewari v. Radha Keshun Kalwar* (1). At the time of partition in 1904 Sonehra and Musammatt Indraoti should have taken steps under Section 118 of the Land Revenue Act. They failed to do so, and the plaintiff's suit for possession of the site by removal of the materials of the house^o cannot be resisted. The appeal, therefore, fails and is dismissed with costs. The defendant-appellant is allowed two months from this date to remove the materials of the house.

Appeal dismissed.

(1) (1910) 5 I.C. 664.

A. I. R. 1915 Allahabad 237

BANERJI, J.

Sheo Prasad and another—Defendants
—Appellants

v.

Lala Ram—Plaintiff—Respondent.

Civil Revn. Petn. No. 2 of 1915, decided on 19th April 1915, from an order of the Offg. Small Cause Court, J., Allahabad, dated 17th June 1914.

Contribution—Decree should apportion each defendant's liability—Joint decree is erroneous—Decree.

In a suit for contribution it is the duty of the Court to determine the amount of liability of each defendant and to make a decree apportioning to each of them the amount for which he is found to be liable. A joint decree is clearly erroneous.

In such a suit what the Court ought to determine is whether the plaintiff has paid for the defendants their share of liability for the original debt. So far as the creditor is concerned, he is entitled to recover what is due to him from all the debtors, but as between the debtors, each of them is liable for so much of the debt as he has not paid to the creditor and as the plaintiff has paid for him. [P. 237, C. 1 & 2.]

Haribans Sahai—for Appellants.

K. N. Laghate—for Respondent.

Judgment.—This application for revision arises out of a suit for contribution brought in the Court of Small Causes at Allahabad so far back as the year 1911. The case came up to this Court once before and after certain issues had been

sent down to the Court below, it was finally remanded to that Court for retrial in accordance with the judgment of Mr. Justice Tudball reported as *Lala Ram v. Sheo Prasad* (1). The facts are these:—

The plaintiff and the two defendant-jointly took a lease from the Oudh and Rohilkhand Railway Company for cutting grass. The rent reserved by the lease was Rs. 2,000. The Railway received on account of rent the total sum of Rs. 1,533-5-6; for the balance, namely Rs. 466-10-6, a suit was instituted on behalf of the Secretary of State against the three defendants and a decree was obtained on the 28th of May 1909. The amount of the decree was realised from the plaintiff alone and thereupon he brought the suit, out of which this application for revision arises, for contribution against the two defendants. The suit was first dismissed, on the ground that it could not be maintained until after an account of the partnership had been taken. The defendants contended that they had paid off their share of liability for the rent and that nothing was due by them. After the remand by this Court the case was tried by the learned Judge of the Court of Small Causes and he made a decree for the full amount of the claim against the two defendants.

This decree is clearly wrong in one respect. It was made jointly against both the defendants. In a suit for contribution it is the duty of the Court to determine the amount of liability of each defendant and to make a decree apportioning to each of them the amount for which he is found to be liable. A joint decree is clearly erroneous.

There is another error in the decision of the Court below, and it is this.

The learned Judge thinks that because a decree was passed against the plaintiff and defendants, therefore the defendants are liable for 2/3rd of the decretal amount. This view also is clearly erroneous.

In a suit for contribution what the Court ought to determine is, whether the plaintiff has paid for the defendants their share of liability for the original debt. So far as the creditor is concerned he is entitled to recover what is due to him from all the three debtors, but as between themselves each of them is liable for so much of the

(1) (1913) 20 I.C. 176.

debt as he has not paid to the creditor and as the plaintiff has paid for him. If the learned Judge had proceeded to try the case from this point of view, he would not have made a decree in the manner in which he made it. After the remand no evidence was given to show how the partnership account stood and, therefore, the case had to be tried independently of the partnership account, there being no materials before the Court to enable it to judge what would be the liability of each partner if a complete account of the partnership were taken.

As I have said above, the total amount of rent payable by the parties was Rs. 2,000; each of them was, therefore, liable out of that amount for Rs. 666-10-8. We have to see how much was paid by each of them out of this amount. From the evidence of Mr. Bowder, the Engineer of the Railway, it appears that two sums of Rs. 500 each were paid up to the 19th of October 1907. There is no clear evidence as to who made these payments, that is to say, who found the funds with which this sum of Rs. 1,000 was paid. The plaintiff says in his deposition that he paid the first item of Rs. 500 out of funds in hand, by which he apparently meant the partnership funds, that is to say, the proceeds of the sale of grass. If that statement is true, then all the partners contributed that sum. As for the 2nd item there is an absence of evidence as to who contributed that sum. Mr. Bowder makes a somewhat vague statement on the point, as he says that one or other of the defendants must have paid the last six items mentioned by him. In the absence of clear evidence it must be presumed that the second sum of Rs. 500 was also paid by all the three persons; so that out of this sum of Rs. 1,000 each of the two defendants, Shiv Prasad and Shiv Tahal, must be deemed to have paid one-third, *i. e.*, Rs. 333-5-4. Mr. Bowder's evidence shows that Shiv Prasad paid Rs. 300 more on three different dates and that Shiv Tahal paid Rs. 233-5-6. In the absence of any evidence to show that this money was paid by them out of the proceeds of the partnership business, they must be presumed to have paid the two sums mentioned above. Therefore, the total amount contributed by Shiv Prasad must be held to have been Rs. 633-5-4 and that contri-

buted by Shiv Tahal Rs. 566-10-10. Shiv Prasad and Shiv Tahal were, as I have said above, liable for Rs. 666-10-8 each. Therefore, the amount contributed by Shoo Prasad was short by Rs. 33-5-4 and that contributed by Shiv Tahal was short by Rs. 99-15-10. These are the amounts for which these two persons must be held liable to the plaintiff. The result is that I discharge the decree of the Court below and make a decree in the plaintiff's favour for Rs. 33-5-4 against Shiv Prasad and Rs. 99-15-10 against Shiv Tahal.

Having regard to all the circumstances of the case, I direct that the parties bear their own costs of the whole litigation including the costs in this Court.

Appeal allowed; Decree modified.

A I. R. 1915 Allahabad 238

TUDBALL, J.

Sital Prasad Ghosh—Applicant

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 206 of 1915, decided on 16th April 1915, from the order of the Mag. 1st Class, Allahabad.

Agra and Oudh Water Works Act (1 of 1891), S. 46—Waste water can be used for garden—Other supply was dry but garden was watered—Circumstances were not sufficient to conclude that offence of using water meant for domestic purposes for garden was committed.

Waste water may be used for the purposes of a garden as it cannot be used for a second time for domestic purposes.

In cold weather the garden of the applicant was found well watered but the *pucca* reservoir and channel connected with a well in the garden were dry and full of leaves:

Held, that this circumstance was not sufficient for conviction of the applicant for having used for gardening the water supplied for domestic purposes. [P. 239, C. 1.]

R. Malcomson—for the Crown.

Judgment.—This application arises out of a conviction under Section 46 of the Water Works Act. The facts on which the conviction is based are as follows:—

The applicant, Mr. Sital Prasad Ghosh, has a house and a garden. In the garden there is a well, attached to it there is a *pucca* reservoir and a *pucca* channel. Part of the garden is used for the purposes of growing vegetables. The Chairman and Assistant Secretary of the Municipal Board visited the premises on the 5th December, 1914. They saw that the vegetable garden was well watered and found the reservoir

dry and the channel containing a large amount of leaves. They saw a pair of bullocks entering the compound. Half an hour before this the Chairman and Assistant Secretary had been visiting the other houses in the neighbourhood.

The Court below has drawn, on these facts, the inference that the water which was supplied for domestic purposes had been used for the purpose of watering the garden. The Assistant Secretary stated that in his opinion the reservoir and the channel could not have been used for a fortnight because they were dry and there was a large amount of leaves in the channel. I take it for granted that waste water may be used for the purpose of the garden as it could not be used for a second time for domestic purposes. In my opinion these facts do not legitimately raise the inference that Mr. Sital Prasad Ghosh had used the Municipal water. It was cold weather when the premises of the applicant were visited and land watered then continues to be wet for a considerable length of time and the bare fact of the garden being wet at the time is not in itself a sufficient fact even with the presence of leaves in the water channel for the conviction of the applicant of the offence of which he has been convicted. I am, therefore, of opinion that the facts found are insufficient to support the applicant's conviction. I set aside the order of the Court below. The fine will be refunded.

Conviction set aside.

A. I. R. 1915 Allahabad 239

RICHARDS, C. J. AND TUDBALL, J.

Baru Mal and others—Plaintiffs—
Appellants

v.

Tansukh Rai and another—Defendants—
Respondents.

Second Appeal No. 205 of 1914, decided on 25th May 1915, from the decision of the Dist. J., Saharanpur, dated 17th December 1913.

(a) *Pre-emption*—*Wajib-ul-arz*—*Presumption that entries refer to custom can be rebutted by the language read with other evidence.*

The entries in a *wajib-ul-arz* are *prima facie* to be regarded as referring to customs rather than to agreements. But this does not preclude the Court from taking into consideration, when considering the evidence as a whole, the language which is used in the *wajib-ul-arz* along with other evidence. [P. 239, C. 2.]

(b) *Civil P. C. (5 of 1908), S. 100—Finding of non-existence of custom on entire evidence is*

finding of fact.

If on a consideration of the entire evidence the Court is not satisfied that a custom exists, the finding is a finding of fact and the High Court cannot interfere in second appeal. [P. 240, C. 1.]

(c) *Pre-emption*—*Wajib-ul-arz*—*No decision by High Court about non-existence of custom of pre-emption in Saharanpur district or that Wajib-ul-arz in Saharanpur are not evidence of custom.*

The High Court has never decided that a custom of pre-emption cannot exist in the Saharanpur District or that the *wajib-ul-arz* in Saharanpur are not evidence of a custom.

10 Ind. Cav. 558: Referred to. [P. 240 C. 1.]

Surendro Nath Sen—for Appellants.

Jogendra Nath Mukerji—for Respondents.

Judgment.—This appeal arises out of a suit for pre-emption. The plaintiff is a co-sharer. The vendee is a stranger. The plaintiff adduced in evidence in support of the existence of the alleged custom an extract from the *wajib-ul-arz* of 1867. No earlier *wajib-ul-arz* was produced. He also adduced in evidence two decrees, one based on a compromise and the other a decree in which the question of custom was not decided. There were some oral evidence but on cross examination these witnesses had to admit that there had been sales to strangers and no pre-emption claimed. Lastly he produced an extract from the *wajib-ul-arz* for the current Settlement, which refers to the *wajib-ul-arz* of 1867 for the "customs" which were not specified in the document itself. The entry in the *wajib-ul-arz* of 1867 no doubt refers to a right of pre-emption. In the very same clause, however, there are references to a number of other matters which it is extremely improbable were existing customs. In fact the *wajib-ul-arz* appears to be almost, if not quite identical with the *wajib-ul-arz* referred to in the case of *Dhian Kuar v. Diwan Singh* (1). It seems to us that the Court considering the proper issue in the case, namely, does or does not the custom exist, was justified in saying that he was not satisfied that the custom existed on the evidence produced, bearing in mind that the onus lay on the plaintiff. This would be a finding of fact binding on this Court in second appeal. No doubt it has been decided by a Full Bench of this Court that entries in the *wajib-ul-arz* are *prima facie* to be regarded as referring to customs rather than to agreements. But

(1) [1911] 10 I.C. 558.

this does not preclude the Court from taking into consideration, when considering the evidence as a whole, the language which is used in the *wajib-ul-arz*. The learned District Judge commences his judgment with the following words: "As regards the entry in the *wajib-ul-arz* relating to pre-emption, it seems to be settled as the result of a series of rulings of the Hon'ble High Court that in the Saharanpur District the *wajib-ul-arz* is evidence of contract which lasts only during the Settlement to which it relates and is not proof of custom." We do not think that these remarks are correct. This Court has never decided that a custom of pre-emption cannot exist in the Saharanpur District, or that the *wajib-ul-arz* in Saharanpur are not evidence of a custom. Each case should be decided on its own facts and circumstances. In the case of *Dhian Kuar v. Diwan Singh* (1) to which we have already referred, the lower Appellate Court held on the evidence that the custom of pre-emption was not proved. This Court in second appeal referred to the evidence that had been produced on behalf of the plaintiff. It consisted of an entry from the *wajib-ul-arz* of 1867 and nothing more. The earlier *wajib-ul-arz* were not produced. This Court held that the Court below was entitled to consider the language of the *wajib-ul-arz*, the fact that the earlier *wajib-ul-arz* had not been produced and that if it came to the conclusion that the plaintiff by merely producing the extract from the *wajib-ul-arz* of 1867 had failed to prove the existence of the custom, the Court was justified in its conclusion. To all intents and purposes the present case stands on exactly the same basis. We, therefore, accept the finding of the Court below as a finding of fact binding on this Court in second appeal. We dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 240

CHAMIER AND PIGGOTT, JJ.

Janki Prasad—Plaintiff—Applicant

v.

Parmeshwar Din Pandey—Defendant—Opposite Party.

Civil Reven. Petn. No. 165 of 1914, decided on 22nd March 1915, from the order of the Munsif, Basti.

Civil P. C. (1908) S. 115—Defendant in jail when ex parte decree passed—Application under O. 9, R. 13 Civil P. C. made after 5 years when released—Munsif granted application—Held application barred by time and proceedings irregular and order without jurisdiction—Civil P. C. (5 of 1908), S. 115 and O. 9, R. 13.

An *ex parte* decree was passed in 1909 when the defendant was in jail. An application to set aside the decree was made in 1913 when the defendant was released from the jail. The Munsif without considering whether the application was barred by limitation granted it on the ground that the defendant being in jail at the time of the hearing of the suit had been prevented from attending the Court and defending it properly:

Held, that the proceedings of the Munsif were irregular and without jurisdiction.

That the Munsif ought to have considered whether the application before him, treated as an application under Order IX, Rule 13, of the Civil Procedure Code, had been made within time, or if he treated the application as one for review of judgment, he should have considered whether the applicant had established sufficient cause, for not applying till after five years had expired since the passing of the decree. [P.241, C.1.]

Pearoy Lal Banerji—for Applicant.

Girdhari Lal Agarwala—for Opposite party.

Judgment.—This is an application for revision of an order of the Munsif of Basti setting aside a decree passed *ex parte* against the respondent and restoring the case to the pending file. It appears that the *ex parte* decree against the respondent was passed as long ago as 1909 when the respondent was in jail. Two applications to set aside the decree were presented by his wife acting on a power-of-attorney from her husband. Both applications were rejected. The respondent was released from jail in September 1913, and on March the 18th, 1914, he presented a third application, which has resulted in the order against which this application for revision is directed. It is quite clear that as an application to set aside a decree passed *ex parte* it was barred by limitation under Article 164, Schedule I, to the Limitation Act. Possibly, however, it might have been treated as an application by the respondent for review of judgment. In that case it was *prima facie* barred by limitation; but it was open to the Court to hold that the respondent had established sufficient cause for not preferring the application sooner. The Munsif did not consider whether the application was barred by limitation; but he set aside the decree on the ground that the respondent being in jail at the time of the hearing of

the suit had been prevented from attending the Court and defending the suit properly. After saying this he added: "Therefore for the ends of justice I am of opinion that the *ex parte* decree should be set aside and the defendant be given an opportunity of defending the suit." It appears to us that the proceedings of the Munsif were irregular and possibly also without jurisdiction. He ought to have considered whether the application before him treated as an application under Order IX, Rule 13, of the Civil Procedure Code, had been made within time, or if he treated the application as one for review of judgment he should have considered whether the applicant had established sufficient cause for not applying till March 1914. He took neither of these courses and he assumed that he had jurisdiction to set aside a decree five years after it was passed, simply because in his opinion the applicant had not had a fair chance of defending the suit. If he had taken up the question of limitation and decided it wrongly we could not have interfered. But he did not apply his mind to the case which he had to decide. As it is, it seems to us impossible to allow his order to stand. We set aside the order and direct that the Munsif do take up the application of the respondent and dispose of it according to law. Costs of this application will be costs in the cause.

Order set aside.

A. I. R. 1915 Allahabad 241

PIGGOTT, J.

Makhdum Bakhsh and others—Defendants—Applicants

v.

Shaukat Ali — Plaintiff — Opposite party.

Civil Revn. Petn. No. 34 of 1915, decided on 20th May 1915, from the order of the Sm. Cause Court J., Allahabad.

Negotiable Instruments Act (26 of 1881) Ss. 13 and 87—Suit on promissory note—Plea of alteration—Held promissory note not being payable to plaintiff or order was not negotiable instrument within S. 87—Injustice not caused by court's not deciding point of alteration so no revision lies—Civil P.C. (5 of 1908), S. 115.

In a suit on a promissory-note one of the defences was that the document had been materially altered and as such could not be the

basis of a suit. The Small Cause Court Judge did not record any definite finding as to the note being materially altered and decreed the plaintiff's suit on the ground that even if the note was executed on the date alleged, the suit was within time by reason of the payment of interest within time:

Held, that as the promissory note was not payable to the plaintiff or his order, it was not a negotiable instrument within the meaning of Section 87 of the Negotiable Instruments Act and justice having been done between the parties, it was not proper for the High Court to interfere in revision and remand the case for a finding as to material alteration. [P. 242, C. 2.]

Parmeshwor Dayal—for Applicants.

Satya Chandra Mukerji—for Opposite Party.

Judgment.—This was a suit before the Court of Small Causes at Allahabad. The claim was on a promissory note which, as brought into Court, purported to be dated November the 28th, 1911. The defendants alleged that the real date was the 28th of November 1910 and that the last figure of the year had been dishonestly altered in order to bring the suit within limitation. They also pleaded payment in full. The learned Judge of the Court below observed that from the appearance of the paper it did seem as if the last figure of the date at the foot of the pro-note in suit had been originally written as a cipher and changed to the figure 1. He came to no finding as to whether this had been done dishonestly, or indeed as to whether it had been done after the execution of the note or as to the date on which the note was actually executed. He held it proved that there had been a payment on account of interest made one year subsequent to the execution of the note, so that the suit was within time whether the pro-note in question was in fact executed on November the 28th, 1910, or 1911. He found against the defendants that no payment was proved over and above the one payment of Rs. 17 already referred to. Upon these findings he decreed the plaintiff's claim.

The defendants have brought the matter before this Court in revision. They contend that the pro-note in suit, having been materially altered, is void as against them and no suit is maintainable in respect of the same.

The real question is whether I ought to set aside the decree passed by the Court below and remand the case for enquiry as to whether there has or has not been any

material alteration in the terms of the pronote in suit since its execution. If the point was one clearly covered by Statute Law, I should feel it my duty to interfere; but the provisions of Section 87 of the Negotiable Instruments Act (XXVI of 1881) are expressly limited to "negotiable instruments" as defined in Section 13 of the same Act. The pronote in suit was not payable to the plaintiff or his order, and was, therefore, not a "negotiable instrument." It has been contended before me that the principle embodied in Section 87 of the Negotiable Instruments Act has been applied, on the authority of English cases and on principles of justice, equity and good conscience, to mortgage-deeds, simple bonds and other documents which are not negotiable instruments. The authorities in this Court on the point seems to be *Ganga Ram v. Chandan Singh* (1) and *Mangal Sen v. Shankar Sahai* (2). I do not think the point so clear as to justify my interference in revision in a case in which, on the findings of fact recorded by the Court below, justice has been done between the parties. I dismiss this application.

Appeal dismissed.

(1) [1882] 4 All. 62.

(2) [1893] 15 All. 580 = 1903 A.W.N. 122.

A. I. R. 1915 Allahabad 242

CHAMIER AND PIGGOTT, JJ.

Badan—Judgment-debtor—Appellant

v.

Murari Lal and another—Decree-holders—Respondents.

Ex. Second Appeal No. 493 of 1914, decided on 8th March 1915, from a decree of the Dist. J., Meerut.

Transfer of Property Act (4 of 1882), S. 101—*Acquisition by mortgagor by inheritance interest of prior mortgagee*—*Prior mortgage is extinguished.*

Where a mortgagor inherits the interest of the mortgagee under a prior mortgage, the prior mortgage is extinguished, and the mortgagor cannot set it up against a subsequent mortgagee.

Acquisitions by a mortgagor enure as a rule for the benefit of his mortgagee, thereby increasing the value of his security. [P. 243, C. 2.]

Otter v. Vaux, 2 K. & J. 650, affirmed, *Platt v. Mendel*, (1884) 27 Ch. D. 246; 5 C. L. J. 95; approved of.

Nihal Chand—for Appellant.

Tej Bahadur Sapru and Surendra Nath Sen—for Respondents.

Judgment.—The question for decision in this appeal is whether the respondents

are entitled, as held by the lower Appellate Court, in execution of a decree on a mortgage to bring the property to sale free from a prior mortgage. The appellant mortgaged the property first to Umrao Singh and afterwards to Bhup Singh. Umrao Singh sued on his mortgage without impleading Bhup Singh and obtained a decree for sale, which he transferred to the appellant's brother Bahal. Bhup Singh transferred his mortgage to the respondents, who obtained a decree for sale subject to the prior mortgage. Bahal died leaving the appellant as his sole heir. The respondents have now applied for execution of their decree, and they claim to be entitled to bring the property to sale free from the prior mortgage, on the ground that, when Bahal died and the benefit of the prior mortgage passed to the appellant, that mortgage merged in the appellant's proprietary right and was extinguished. The appellant on the other hand contends that no merger took place. The first Court held with the appellant, but the lower Appellate Court accepted the contention of the respondents. Hence this appeal.

Section 101 of the Transfer of Property Act was referred to in the course of the arguments, but that section appears to apply only to the converse case of the owner of an encumbrance becoming the absolute owner of the property, though it is not easy to see why the words "is or" were inserted in the section. There being no legislative provision on the question for decision, the case must be decided according to broad principles of equity and good conscience, with such assistance as may be afforded by reported decisions of the Courts. We have not been referred to any case that is precisely in point, but there are several cases which bear more or less closely on the point now before us. The question whether an encumbrance acquired or paid off by the absolute owner of the property is to be considered extinguished or kept alive for his benefit is, according to a long line of authorities, generally one of intention. In the case of *Thorne v. Cann* (1), Lord Macnaghten said: "Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to

(1) (1895) A. C. 11 = 64 L. J. Ch. 1 = 11 R. 67 = 71 L.T. 852.

pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot." The decision in *Johnson v. Webster* (2) shows that the rule is the same where the owner of an estate inherits a charge thereon. In the absence of expressed intention to the contrary, it will be presumed that when a person claiming to be absolute owner of property acquires or pays off a mortgage thereon, and there is no subsequent encumbrance, he intends to extinguish the mortgage, but, where there is an encumbrance intermediate between the mortgage paid off or acquired and the ownership of the property, the presumption is the other way [See *Johnson v. Webster* (2), *Mohesh Lal v. Mohant Bawan Das* (3), *Adams v. Anjell* (4) and *Gokaldas Gopaldas v. Puranmal Prem-sukhdas* (5)]. It would be very much to the advantage of the appellant to keep the first mortgage alive, and in various ways which need not be detailed he has shown that he wishes to keep it alive. The question is whether the rule stated above, which is founded on the clearest equity and has, as we have shown, been applied by their Lordships of the Privy Council to Indian cases, applies to the case before us in which both mortgages were made by the owner of the property, who however wishes to hold one up against the other. In England and also in India it has been held that if the owner of an estate creates and pays off a mortgage, the mortgage merges in the owner's estate, and that an owner who has paid off a prior encumbrance cannot set it up against his own

mortgage [See *Otter v. Vaux* (6), the dictum of Chitty, J., in *Platt v. Mendel* (7) and *Bhaju Chaudhri v. Chuni Lal* (8)]. Like the general rule, this exception to it seems to us to be founded on the plainest equity. Does the fact that the appellant inherited the prior mortgage furnish any ground for distinguishing the present case from the cases last referred to? We think not. Indeed we are inclined to think that the fact that the appellant acquired the rights of the prior mortgagee without having to pay for them, makes the case somewhat stronger against him than it would have been if he had paid for them. It seems to us that it would be inequitable to allow the appellant to set up a mortgage which he himself created, but on which he has had to pay nothing, against a subsequent mortgage which he undertook personally to discharge. Acquisitions by a mortgagor enure as a rule for the benefit of his mortgagee, thereby increasing the value of his security, see *Raja Kishen Datt v. Raja Mumtaz Ali Khan* (9) and *Amudhi Prasad v. Man Singh* (10). On the whole we are of opinion that the decision of the lower Appellate Court is correct. To avoid misapprehension we may add that it has not been shown that the appellant's brother left any debts. The prior mortgage would, of course, be liable in the hands of the appellants for the debts of his brother. There could be no question of merger to the prejudice of the brother's creditors.

The appeal is dismissed with costs.

Appeal dismissed.

(2) (1854) 4 De G. M. & G. 474 = 3 Eq. R. 99 = 24 L. J. Ch. 300 = 1 Jur. (N. S.) 145 = 3 W. R. 84 = 2 Sm. & G. 186 = 43 E. R. 592 = 24 L. T. (O. S.) 178 = 102 R. R. 225.

(3) (1882-83) 10 I. A. 62 = 9 Cal. 951 = 13 C. L. R. 221 = 4 Sar. P. C. J. 424 (P. C.)

(4) (1877) 25 W. R. 139, affirmed = 5 Ch. D. 634 = 46 A. J. Ch. 352 = 36 L. T. 334.

(5) (1881) 10 Cal. 103 = 11 I. A. 125 = 1 Sar. P. C. J. 543 (P. C.).

(6) (1856) 2 K. & J. 650, affirmed = 43 E. R. 1881 = 106 R. R. 235 = 6 De G. M. & G. 638 = 26 L. J. Ch. 128 = 3 Jur. (N. S.) 162 = 5 W. R. 188.

(7) (1894) 27 Ch. D. 246 = 54 L. J. Ch. 1145 = 51 L. T. 421 = 32 W. R. 913.

(8) (1907) 11 C. W. N. 234 = 5 C. L. J. 93.

(9) (1880) 5 Cal. 198 = 5 C. L. R. 213 = 6 I. A. 141 = 4 Sar. P. C. J. 17 = 7 Suth. P. C. J. 637 = *Rasquin & Jackson's P. C. No. 58* = 3 Ind. Jur. 426 = *Shome L. R. 1* (P. C.).

(10) (1903) 25 All. 46 = (1902) A. W. N. 176.

A. I. R. 1915 Allahabad 244

PIGGOTT, J.

Makhdoom Bakhsh Shah and others—
Defendants—Appellants

v.

Hashim Ali—Plaintiff—Respondent.

Second Appeal No. 538 of 1914, decided on 22nd April 1915, from the decision of the Dist. J., Azamgarh, dated 3rd February 1914.

Specific Relief Act (1 of 1877), S. 9—Difference between suit under S. 9 and suit on possessory title against trespasser is that defence of title can be taken in the latter and on failure plaintiff entitled to decree.

A suit in ejectment on the basis of possessory title is maintainable against any person who cannot show title in himself, apart altogether from the provisions of Section 9 of the Specific Relief Act. The difference is that in a suit under the Specific Relief Act, the defendant will not be allowed to plead or to prove title in himself; whereas in a suit upon possessory title brought independently of the provisions of the Specific Relief Act, or even after the period of limitation prescribed for a suit under Section 9 of that Act has expired, the defendant will be allowed to plead his title and to prove it, if he wants to do so. If he fails to do so, the plaintiff can get a decree, even though he has been able to prove nothing more than possession by himself of the property in suit up to the date of his wrongful ejectment by the defendants. Case law Ref. [P. 245, C. 1 & 2.]

Shafi-u-Zaman—for Appellants.

S. M. Suleman—for Respondent.

Judgment.—This is one of those second appeals in which the only real difficulty is to ascertain with certainty what facts the lower Appellate Court intended to find, or must be taken to have found. The suit was one for recovery of possession over a certain plot of land and a tree situated thereon. If I rightly understand the pleadings there never was any question of title, strictly so called, in issue between the parties. The land in question is situated in the *abadi*, or inhabited site, of an agricultural village, and the proprietors of the soil are no doubt the *zamindars* of the village. The plaintiff alleged that he had been for many years in actual possession and occupation of the land in suit, having erected a thatched hut thereon and possessing the rest of the land, not actually covered by the suit, as a courtyard appertaining to the same. He further alleged that, during his absence from the village, the defendants, without any sort of right or title, had demolished the hut which belonged to him and taken possession of

the land and of the tree, erecting a shed of their own on some portion of the land. The defendants' reply was that the plaintiff had never been in possession, that they had never dispossessed him, but that on the contrary they themselves had been in possession and occupation of the land for many years. The first Court found that the plaintiff had failed to prove any title to the land in himself, and, upon this finding alone, dismissed the suit. One of the grounds expressly taken by the plaintiff when he appealed to the Court of the District Judge was that he was entitled to a decree on proof of the fact of his possession. At the hearing of the appeal by the District Judge, a question of procedure arose which has to some extent complicated the case. The defendants themselves in the Court of first instance had pleaded that the land in suit had, many years previously, been occupied by the residential house of a tenant named Reoti. They alleged that the said Reoti had died many years prior to the institution of the suit, leaving no heir, and that they had themselves occupied the site ever since the time of Reoti's death. In connection with this plea the plaintiff produced in the Court of first instance a mortgage-deed in his favour purporting to be executed by this Reoti Kahar. The learned Munsif seemed to have thought that the production of this document could not help the plaintiff's case, because there was nothing in his plaint to indicate that he claimed possession of the land in suit on the strength of any title as a mortgagee. He also held that the document had not been sufficiently proved by the evidence of the scribe, Uttam Lal. The learned District Judge has not clearly stated that he held this document to be proved; but there is a passage in his judgment which shows that he regarded it as evidence of the fact of the plaintiff's possession. The document is unregistered, and the transaction was one of usufructuary mortgage for a sum of less than Rs. 100 so that it could have been effected at the date in question without execution of any document. Under the circumstances the learned District Judge was entitled to hold it proved, and he seems to have so held, that Reoti, who was admitted before him to have been the former occupier of the land in suit, had transferred, or purported to transfer, whatever rights of

occupation he possessed to the plaintiff by way of usufructuary mortgage. What the learned District Judge has, in my opinion, undoubtedly found is that, on the evidence as a whole the fact of the plaintiff's being in possession, and of his wrongful dispossession by the defendants at or about the date alleged in the plaint, is satisfactorily proved. On this finding he has decreed the plaintiff's suit. The contentions before me in second appeal are substantially three. One is to the effect that there has been no clear finding by the lower Appellate Court on the fact of the plaintiff's possession and with regard to his dispossession by the defendants. This plea is to my mind concluded by a perusal of the judgment of the lower Appellate Court. The second point taken is that the unregistered mortgage by Reoti in favour of the plaintiff was not legally proved. I think, under the circumstances of the case, there was evidence on the record upon which the lower Appellate Court was entitled to come to the finding which I have already set forth. The third point taken is that the lower Appellate Court made an entirely new case for the plaintiff. This has been argued before me on the assumption that the learned District Judge must be taken to have decreed the plaintiff's claim as a claim for recovery of possession under Section 9 of the Specific Relief Act. There is authority for the proposition that a suit for recovery of possession based upon title should not be allowed to be converted into one under Section 9 of the Specific Relief Act. I do not think, however, that the learned District Judge has offended against this principle. The argument addressed to me on behalf of the defendants-appellants overlooks the fact that there can be a suit in ejectment on the basis of possessory title, maintainable against any person who cannot show title in himself, apart altogether from the provisions of Section 9 of the Specific Relief Act. The difference is that, in a suit under the Specific Relief Act, the defendant will not be allowed to plead or to prove title in himself; whereas in a suit upon possessory title brought independently of the provisions of the Specific Relief Act, or even after the period of limitation prescribed for a suit under Section 9 of that Act has expired, the defendant will be allowed to plead his

title, and to prove it if he wants to do so. If he fails to do so, the plaintiff can get a decree, even though he has been able to prove nothing more than possession by himself of the property in suit up to the date of his wrongful ejectment by the defendants. Authority for these propositions may be found in *Pemraj Bhavaniram v. Narayan Shivaram Khisti* (1), *Wali Ahmad Khan v. Ajudhia Kandu* (2), *Gobind Prasad v. Mohan Lal* (3) and *Ismail Ariff v. Mahomed Ghous* (4). As I have already pointed out, the present suit is one in which title, other than what may be called possessory title, was not set up by, and was not in fact vested in, either of the parties, I do not think that the decision of the learned District Judge is open to objection upon any of the grounds taken. I dismiss this appeal with costs.

Appeal dismissed.

(1) [1881-82] 6 Bom. 215.

(2) [1891] 13 All. 537=(1891) A.W.N. 196.

(3) [1902] 24 All. 157.

(4) [1893] 20 Cal. 834=20 I.A. 99 (P.C.)

A. I. R. 1915 Allahabad 245

CHAMIER AND PIGGOTT, J.

Emperor—Applicant

v.

Gangua—Opposite Party.

Criminal Revn. Petn. No. 113 of 1915, decided on 11th March 1915, from an order of acquittal of the S. J., Mainpuri.

Criminal P. C. (5 of 1898), S. 339—Prosecution of person forfeiting pardon under specific charge cannot be directed by Sessions Judge—He can only invite District Magistrate's attention—Plea of pardon can be raised before Sessions Judge.

In a case of dacoity one of the accused G was given a conditional pardon. The Sessions Judge, being of opinion that he had not spoken the truth, directed his prosecution under Section 397 of the Penal Code. G pleaded pardon before the Sessions Judge, but not before the Magistrate:

Held, that the Sessions Judge had no authority to direct the prosecution of G on any specific charge and that if he came to the conclusion that the approver had wilfully concealed anything essential or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion or possibly to suggest the propriety of his prosecution. *Case-law Ref.*

Held, further, that G was entitled to plead pardon before the Sessions Judge, although he had not done so before the Committing Magistrate. [P. 246, C. 2.]

R. Malcomson—for the Crown.

Judgment.—In this case it appears that one Gangua was suspected of having taken part in a serious dacoity, committed at a village called Manpore in the Etawah district on the 23rd of October 1913. He made a confession before a Magistrate and received a conditional promise of pardon. He was produced before the Sessions Judge as a witness against Abadua and others (Sessions Trial No. 8 of 1914, Etawah Sessions). The learned Sessions Judge who tried that case came to the conclusion that Gangua had not given true evidence. We have examined the judgment in that case, and in some points we find it a little difficult to follow the reasoning of the learned Sessions Judge. Apparently, however, he was of opinion that Gangua had in any case, whether he was actually concerned in the dacoity or not, made false statements regarding a certain pair of earrings produced as one of the Exhibits in the case. He concluded his order, after directing the acquittal of the accused persons then before him, with the following words:—"The approver has not spoken the truth and he will, therefore, forfeit his pardon. The confession made by him may be sufficient for his own conviction on the original charge of dacoity, though it is valueless without corroboration as against his associates. I direct the prosecution of Gangua on a charge under Section 397." In accordance with this order proceedings were taken against Gangua and he was committed for trial. In the Committing Magistrate's Court Gangua did not plead the pardon, and it was apparently taken for granted that the Sessions Judge's order of May 26th, 1914, quoted above, was conclusive on this point. When Gangua was placed on his trial before the successor of the learned Sessions Judge who had passed the order of May 26th, 1914, he did plead that he had not broken any of the conditions on which pardon had been tendered him and, therefore, had not forfeited his pardon. Upon this the learned Sessions Judge appears to have called upon the Pleader employed to conduct the prosecution in that particular case to state what evidence he relied upon in order to prove that Gangua had forfeited his pardon. He made a note of various statements on this point made by the Pleader and thereupon passed an order,

accepting the prisoner's plea that, he had not broken the conditions of his pardon, acquitting him and directing his immediate release. The record was called for by this Court on a perusal of the Sessions statements for the district of Etawah for the month of November 1914, and is before us in order that we may consider the propriety of the above proceedings.

We have examined a number of reported cases, in which the question of the change in the law effected by the substitution of the word "forfeited" for the word "withdrawn" in Section 339 of the Code of Criminal Procedure has been considered by various High Courts. We may refer to *Emperor v. Kothia* (1), *Kullan v. Emperor* (2), *Aligiriswami Naicken, In re* (3), *Emperor v. Abani Bhushan Chuckerbutty* (4). We are satisfied that the Sessions Judge's order of May 26th, 1914 was irregular and has given rise to the difficulties experienced by the Magistrate and the Sessions Judge in dealing with this matter. The Sessions Judge before whom Gangua gave evidence at the trial of Abadua and others had, no doubt, authority to pronounce his opinion as to the truthfulness or otherwise of the whole or any part of Gangua's evidence, apart from the question whether it was sufficient for the conviction of any of the accused persons then on their trial. If he came to the conclusion that Gangua had wilfully concealed anything essential, or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion, or possibly to suggest the propriety of Gangua's prosecution. He had no authority to direct the prosecution of Gangua on any specific charge. When the committing Magistrate took up this matter it was open to Gangua to have pleaded his pardon in that Court, precisely as he did afterwards before the Court of Session. If he had done so, the Magistrate would have been bound to inquire into the matter, at least

(1) (1906) 30 Bom. 611=8 Bom. L. R. 740=4 Cr. L. J. 346.

(2) (1905) 2 I.C. 343=32 Mad. 173=9 Cr. L. J. 571.

(3) (1910) 5 I.C. 831=33 Mad. 514=11 Cr. L. J. 254.

(4) (1910) 8 I. C. 721=37 Cal. 845=11 Cr. L. J. 702.

to the extent of satisfying himself that there was *prima facie* ground for holding that Gangua had forfeited his pardon, and to include in his commitment order a statement of the evidence on which he relied as establishing this fact. Probably the form of the order passed by the Sessions Judge at the trial of the case against Abadua and others prevented the committing Magistrate from looking at the matter from this point of view. When the case against Gangua came before the Sessions Court, Gangua was entitled to plead his pardon, and the Sessions Judge was right in recording the plea and in asking the Pleader, employed to conduct the prosecution, what evidence he intended to offer in disproof of the same. Ordinarily, in our opinion, the proper course to have followed in such a case would be, first of all, to have put in evidence the record of the statement made by Gangua as a witness at the former trial, together, if necessary, with evidence as to the identity of the person making that statement. In order to form an opinion whether in the course of that statement Gangua had given false evidence, or had wilfully concealed anything essential, it might very possibly have been necessary for the learned Sessions Judge to have recorded evidence in the case, or at any rate the evidence particularly bearing on the question of the recovery of the pair of earrings already alluded to. In passing an order of acquittal without taking any evidence, and without any withdrawal of the prosecution by a Public Prosecutor properly authorized to withdraw the same under Section 494 of the Code of Criminal Procedure, the learned Sessions Judge adopted, in our opinion, an irregular procedure. At the same time, under the circumstances of this particular case, we are not disposed to interfere. The fact of the matter is, as already pointed out, that the Courts concerned, and we have no doubt also the District Magistrate, were placed in a difficulty by the irregular order passed by the Sessions Court on May 26th, 1914. Apparently, in the opinion of those responsible for conducting the prosecution, Gangua had not given false evidence, either in respect of this pair of earrings or in any other matter of importance. Consequently when the learned Pleader instructed by the District Magistrate was

called upon to inform the Sessions Judge what evidence there was on which he relied as showing that Gangua had forfeited his pardon, he was unable to state that evidence to the satisfaction of the Sessions Court. It would seem that this prosecution ought never to have been instituted and would never have been instituted but for the Sessions Judge's order of May 26th, 1914.

For these reasons we decline to interfere in this matter, and merely order that the record be returned. If Gangua is under arrest he should be at once released; otherwise his security is hereby discharged.

Record returned.

A. I. R. 1915 Allahabad 247

CHAMIER AND TUDBALL, JJ.

Ram Autar Tewari—Defendant—Applicant

v.

Deoki Tewari — Plaintiff — Opposite party.

Civil Reven. Petn. No. 21 of 1915, decided on 11th May 1915, from an order of the Addl. Dist. J., Gorakhpur, dated 24th October 1914.

Civil P. C. (5 of 1908), S. 115, Sch. II, Cl. 15—Order setting aside award is appealable hence no revision lies.

An order of a Court setting aside an award on the ground of its invalidity on account of misconduct of the arbitrators is appealable. 28 All. 408; and 4 A.L.J. 256 not appr. and Case Law Ref. [P. 248, C. 2.]

Jang Bahadur Lal—for Applicant.

Ishwar Saran—for Opposite party.

Judgment.—This application for revision arises out of a suit filed in the Court of a Munsif. The parties agreed to refer the matters in difference between them to arbitration and an order of reference was made accordingly. The time for completing the award was extended from time to time up to December 2nd, 1912. On the case being called on on that date, it was found that the award had not been filed. The Munsif then made an order superseding the arbitration and fixed December 10th for the hearing of evidence. On December 5th the arbitrators filed an award purporting to have been made on December 2nd, but the Munsif held that the award had not been made in time and he declined to re-call his order superseding the arbitration. Ultimately he tried the case out and dismissed it. The plaintiff

appealed to the District Judge, and one of his grounds of appeal was that the award had been made in time, and, therefore, the arbitration should not have been superseded. The Additional Judge held that the Munsif was wrong in holding that the award had not been made within time merely because it had not been filed in Court within the time limited, and that he should have enquired whether it had been made by the arbitrators within that time. Accordingly he remanded the case under Order XLI, Rule 23. The Munsif after inquiry dismissed the suit again, holding that the award had not been made within time, and also that it was invalid on account of misconduct by the arbitrators. The plaintiff appealed and the Additional Judge found that the award had been made within time, and he remitted an issue on the question of misconduct. The Munsif found on the issue in favour of the plaintiff. The Additional Judge agreed with the Munsif and passed a decree in accordance with the award which was in favour of the plaintiff. The defendant has applied to this Court for revision of the order of the Additional Judge, on the ground that the Munsif's second order holding that the award was invalid on account of misconduct of the arbitrators could not be interfered with by the Additional Judge. No appeal lies against the order of a Court under paragraph 15 of the 2nd Schedule to the Code of Civil Procedure setting aside an award, and it is contended that the order cannot be challenged in appeal against the decree in the suit, because even if it is erroneous it does not affect the decision of the case within the meaning of Section 105 of the Code. The applicant relies upon the decisions of this Court in *Ganga Prasad v. Kura* (1) and *Kalyan Das v. Piary Lal* (2). In the latter case Aikman, J., merely followed the former which was a decision by two Judges. The learned Judges who decided the former case profess to follow the decision of Banerjee, J., in *Shyama Charan Pramanik v. Prolhad Durwan* (3), but an examination of the judgment of Banerjee, J., shows that he was of opinion

that an Appellate Court was entitled in an appeal against a decree to interfere with the order of the Court of first instance setting aside an award. He held that a second appeal lay against the decision of the Appellate Court and he sent the case back in order that certain evidence might be taken. The judgment of Banerjee, J., seems to us to give no support whatever to the view taken in *Ganga Prasad v. Kura* (1). The decision in the last-mentioned case and the decision in *Kalyan Das v. Piary Lal* (2), which follows it, seem to stand quite alone. They are inconsistent with several decisions of this Court beginning with the Full Bench decision in *Nanak Chand v. Ram Narain* (4) and ending with the decision of Knox and Griffin, JJ., in *Ram Jiwan v. Nawal Singh* (5), with the decision of the Bombay High Court in *Damodar Trimbak v. Raghunath Hari* (6) and with a long string of cases in the Madras High Court ending with *Achuthayya v. Thimmayya* (7). It seems to us that an order of a Court setting aside the award of an arbitrator and deciding that the case shall be tried by the Court is an order affecting the decision of the case within the meaning of Section 105 of the Code. It has been held that the words "affecting the decision of the case" in Section 105 mean "affecting the decision of the case on the merits," but even so we think that the order of the Munsif setting aside the award was liable to be challenged in appeal against the decree. As long ago as 1870 Sir R. Couch and Kemp, JJ., held that such an order affected the decision on the merits, see *Mothooranath Tewaree v. Brindabun Tewaree* (8). The weight of authority is clearly against the applicant and we are of opinion also that the order of the Munsif was liable to be challenged in appeal against the decree. It is not suggested that there is any other ground upon which we could in revision interfere with the order of the learned Additional Judge. This application is dismissed with costs.

Application dismissed.

(1) [1906] 28 All. 408=(1906) A. W. N. 64=
3 A.L.J. 168.
(2) [1907] 4 A.L.J. 256=(1907) A.W.N. 110.
(3) [1904] 8 C.W.N. 390.

(4) (1878) 2 All. 181.
(5) (1908) 5 A.L.J. 644=1908 A.W.N. 242.
(6) (1902) 26 Bom. 551=4 Bom. L.R. 267.
(7) (1908) 31 Mad. 345=18 M.L.J. 228.
(8) (1870) 14 W.R. 327.

A. I. R. 1915 Allahabad 249**BANERJI AND RAFIQUE, J.J.****Bishambhar Nath and others—Plaintiffs—Appellants****v.****B. Jagan Nath Prasad and others—Defendants—Respondents.**

Second Appeal No. 541 of 1914, decided on 26th May 1915, from the decision of the Dist. J., Cawnpore, dated 23rd January 1914.

Easement Act (5 of 1882), S. 13, Cl. 3 (d)—Blocking of doors always remaining closed and not necessary there being other doors for access held to be no infringement—But blocking of drain there being no other outlet is infringement.

Where the defendants were alleged to have practically closed by staking bricks three doors appertaining to a house and to have stopped the flow of water through a drain which had existed for a number of years, and it appeared that the keeping open of the doors was not necessary for the enjoyment of the premises, that the doors used practically to be closed always, that there was access to the house of the plaintiffs otherwise than through one of these doors and that sufficient light and air could be obtained without the opening of the doors.

Held, (1) that the plaintiffs' claim in respect of the doors was rightly dismissed; [P. 249, C. 2.]

(2) but that as there was no other drain in the house of the plaintiffs and for the flow of water from the kitchen of the house there was no other outlet, the plaintiffs were entitled to use the drain for the flow of water from the kitchen and the defendants could not obstruct it. [P. 250, C. 1.]

Ramakant Malaviya—for Appellants.**B. E. O'Connor—for Respondents.**

Judgment.—The facts of this case are these:—The father of the plaintiff-respondent No. 1 was the owner of an enclosure, on one side of which there was a temple. The enclosure was sold by auction in execution of a decree and was purchased by the defendants. There was some litigation between the parties as regards the portion of the building known as the temple. In that litigation the defendants failed. It is alleged that the defendants have now practically closed, by staking bricks, three doors appertaining to the house, and have stopped the flow of water through a drain which had existed for a number of years. The present suit was accordingly brought for removal of the obstruction to the three doors and for restoration of the drain and for an injunction. It was alleged that the door C, marked on the plan filed with the

plaint, was used as a passage and that the doors A and B were used principally for light and air. The Courts below decreed the claim. Upon appeal this decree was set aside and the claim of the plaintiffs was dismissed in its entirety. It is contended on behalf of the plaintiffs-appellants that the lower Appellate Court has wrongly applied the provisions of Section 13 of the Easements Act to this case. The learned Vakil for the appellants relies on clause 3 (d) of that section, which is to the effect that if an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer took effect, the transferee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement. It is urged that the learned Judge ought not to have considered the matter from the point of view of an easement of necessity, but should have determined whether the doors were necessary for the enjoyment of the building as it was enjoyed before the transfer in favour of the defendant took effect. In our opinion as regards the three doors in question, the learned Judge has found, upon a consideration of all the circumstances, that the keeping open of the three doors is not necessary for the enjoyment of the premises as it was enjoyed before the sale to the defendants. He visited the locality and he has found that according to the statement of the plaintiffs themselves, the doors used practically to remain closed always. He further found that there is access to the house of the plaintiffs otherwise than through one of these doors, and that in two of the rooms there is plenty of light and air, and sufficient light and air can be obtained without the opening of the doors. He came to the conclusion that the existence of these doors was not in the least necessary either for egress and ingress or for the enjoyment of light and air. The meaning of his finding clearly is that for the enjoyment of the house as it was enjoyed before the sale, the existence of the doors is not necessary. In view of this finding the claim in respect of the three doors has been rightly dismissed. As for the drain, we do not agree with the learned Judge. He himself finds that there is no other drain in the house of the plaintiffs, and that for the flow of water from the *rasoi* or kitchen of the house there is no other outlet. It is thus

clear that the maintaining of the drain is necessary for the enjoyment of the house for the flow of water from the kitchen, and the defendants are not entitled to close the drain. Of course the plaintiffs' right is a right to use the drain for the flow of water from the kitchen or *rasoi*, and not for the discharge of ordinary sullage water or rain water from the whole house. The defendants will be at liberty to cover up the drain, but in such a way as not to obstruct the flow of water as it has hitherto been discharged from the kitchen or *rasoi*. We accordingly vary the decree of the Court below to this extent that we direct that the drain be restored for the discharge of water from the kitchen, the defendants being at liberty to cover it up in such a way as not to obstruct the flow of water from the kitchen. In other respects we affirm the decree of the Court below. The parties will pay and receive costs in all Courts proportionately to failure and success, and the costs in this Court will include fees on the higher scale.

Appeal partly allowed.

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CHAMIER AND PIGGOTT, JJ.

Binda Prasad—Opposite party—Appellant

v.

Raghubir Saran and others—Applicants—Respondents.

First Appeal No. 27 of 1915, decided on 6th May 1915, from the order of the Dist. J., Meerut.

Civil P. C. (5 of 1908), O. 47, R. 1—Prayer for opportunity to produce evidence which might change view taken by Judge is not sufficient ground.

An application for review was made on the sole ground that if the Court allowed the applicants another opportunity of producing evidence, they might persuade the Judge that the view taken by him on the previous occasion was erroneous :

Held, that this was not a sufficient ground for review under Order XLVII, Rule 1, of the Civil Procedure Code. [P. 251, C. 1.]

Harendra Krishna Mukerji and A. H. C. Hamilton—for Appellant.

Sital Prasad Ghosh—for Respondents.

Judgment.—This is an appeal by leave of the Court under Section 46, Sub-Sec-

tion (3), of the Provincial Insolvency Act, against an order of the District Judge of Meerut, allowing an application presented by the respondents for review of a previous order, whereby the appellant's half-share in a brick kiln had been released from attachment and declared not to be available as assets for the payment of the debts of one Abdul Haq, who had been declared an insolvent. On June 27th, 1914, Abdul Haq applied to be declared an insolvent and named eleven creditors, among whom were the two respondents, Raghubir Saran and Badr-ud din. On August 27th, he was adjudicated an insolvent and on September 24th, the Deputy Nazir of the Court was appointed Receiver. The Receiver attached or took possession of the brick-kiln, whereupon the appellant objected, saying that the brick-kiln was his property. He explained that it had been the property of himself and his partner Abdul Haq, and that Abdul Haq had on March 26th, 1914, transferred to him his half-share in the brick-kiln for valuable consideration. Thereupon the District Judge directed that the sale of the brick-kiln which had been ordered should be postponed. The appellant had brought a suit in the Subordinate Judge's Court for a declaration of his title as owner of the brick-kiln against Ram Chander and the insolvent. The District Judge accepted the appellant's admitted half-share in the brick-kiln as sufficient security for any loss which might result from the postponement of the sale and thereupon the respondents, Raghubir Saran and Badr-ud-din, presented a petition objecting to the acceptance of Binda Prasad's half-share as security and alleging that the transfer of the insolvent's half-share to him was voidable and should be set aside under Sections 36 and 37 of the Insolvency Act. January 19th was fixed for hearing and ultimately the case was taken up on the 21st, when the District Judge rejected the petition of Raghubir Saran and Badr-ud-din and released the whole of the brick-kiln from attachment, finding that the sale by the insolvent of his half-share in the brick-kiln to Binda Prasad was valid and could not be set aside. Six days later Raghubir Saran and Badr-ud-din presented a petition to the District Judge for review of the order just mentioned. Notice was issued and the District Judge on February 10th, 1915, granted the appli-

cation for review, set aside his order of January 21st and fixed a date for the further hearing of the case, noting that the parties should produce evidence regarding the good faith of the transaction which had been impugned. The District Judge ordered the re-attachment of the brick-kiln and directed the Receiver to sell the bricks as soon as possible and deposit the proceeds in Court. It is against this order that the present appeal was filed. On the application of the appellant the sale of the bricks was postponed pending the disposal of this appeal.

On behalf of the appellant it is contended that the respondents, Raghubir Saran and Badf-ud-din, showed no sufficient cause for a review of the order of January 21st, 1915. It was not suggested in their petition, and it is not suggested now, that they discovered any new and important matter or evidence which was not within their knowledge or could not have been produced by them before the order of January 21st was passed. Nor was it suggested that there was any mistake or error apparent on the face of the record. When the respondent's learned Pleader was asked by this Court to state the ground on which the application for review was based, he said that a review had been asked for "for other sufficient reason" within the meaning of Order XLVII, Rule 1 of the Civil Procedure Code. From the application it appears to us that the ground for review if there was a ground at all, was that if the District Judge allowed the applicants another opportunity of producing evidence they might persuade him that the view taken by him on January 21st was erroneous. The District Judge in granting the application for review and setting aside his previous order does not say that he is satisfied that his previous order was wrong, and does not in any way indicate his reason for allowing the application beyond this, that he thought that there was a case for further inquiry. It seems to us that no sufficient ground was made out for a review of the previous order. An attempt was made on behalf of the respondents to show that the question of the validity of the transfer of half of the brick-kiln was not considered by the District Judge before passing his first order; but an examination of the order shows that the District Judge did apply his mind to that very question. He re-

fers at the beginning of his order to the application of November 19th, 1914, and says that the question is whether the transfer to Binda Prasad should be cancelled under Section 36 of the Insolvency Act. It is, therefore, quite clear that the question was before the Court and was decided upon such materials as were available. Under the circumstances we do not think that the application for review should have been allowed. We, therefore, allow the appeal and set aside the order of the District Judge dated February 10th, 1915, with costs. It appears to us that the appeal has been overvalued. We fix the Vakil's fee in this Court at Rs. 50, fifty rupees, only.

Appeal allowed.

A. I. R. 1915 Allahabad 251

RICHARDS, C.J., AND BANERJI, J.

F. S. Old—Defendant—Appellant
v.

J. A. Shail—Plaintiff—Respondent.

Second Appeal No. 351 of 1914, decided on 12th May 1915, from the decision of the Dist. J., Sharanpur, dated 21st February 1914.

Transfer of Property Act (4 of 1882), S. 106—In Mussorie lease for "season" means lease till end of year.

In the absence of evidence to the contrary a lease of a house at Mussorie for the 'season' continues to the end of the year. [P. 252, C. 1.]

Wallach—for Appellant.

Nihal Chandel—for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff claims possession of a house at Mussorie, called "Oak Bush." The Courts below have given the plaintiff a decree. The defendant appeals. In the plaint the plaintiff alleges that the defendant was his tenant during the season of 1913 either from month to month or for the season, and that on the 14th of October 1913 he gave him notice to vacate the house on the 31st of October 1913 as the tenancy would expire on that date. The suit was instituted on the 19th of November 1913. It is said that the defendant had a lease from the plaintiff's predecessor-in-title covering this very period, that this document could not be given in evidence

because it was unregistered ; the defendant is said to have another lease which will entitle him to possession of the house from the 1st of January 1915. It seems to us that the defendant must be deemed to have been at least a tenant for the season. Having regard to the way in which the rent is paid, it is quite clear that he was not a tenant from month to month. If the defendant was tenant for the "season," he could only be put out at the end of the season of 1913, and it lay upon the plaintiff to prove by clear evidence that the "season" at Mussoorie terminated on the 31st of October. It is quite clear that the plaintiff never proved that the season terminated on the 31st of October. We are not, of course, called on to decide questions of fact, but it seems to us that the "season" would ordinarily continue to the end of the year, and we think that this ought to be the assumption in the absence of evidence to the contrary. If the "season" did not terminate before the 19th of November 1913, then the suit was premature. It is contended on behalf of the respondent that this ground was not taken in the written statement. The defendant pleaded that the plaintiff could not terminate his tenancy at the time he alleged and, in our opinion, this clearly cast the onus on the plaintiff of proving such facts as entitled him to possession of the house on the date on which the suit was brought. We allow the appeal, set aside the decrees of both the Courts below and dismiss the plaintiff's suit with costs in all Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 252

CHAMIER AND PIGGOTT, JJ.

Umrao Kunwar and another—Defendants—Appellants

v.

Badri—Plaintiff—Respondent.

First Appeal No. 23 of 1915, decided on 21st April 1915, from an order of the Dist. J., Meerut.

Hindu Law—Reversioner cannot sue for declaration that widow's will not binding—Will is not alienation.

A suit by a reversioner for a declaration that a Will executed by a Hindu widow in respect of

her husband's property is void and not binding upon him, is not maintainable, as there is no alienation by the widow. Case Law Ref.

[P. 252, C. 2 & P. 253 C. 1.]

Tej Bahadur Sapru—for Appellants.

S. M. Sulaiman—for Respondent.

Judgment.—This was a suit by a plaintiff claiming to be the next reversioner under the Hindu Law to the estate of one Dewa. The said Dewa died leaving a widow, Umrao Kunwar. This lady has executed a Will bequeathing the property in her hands as widow of Dewa to one Tika Ram, son of Naidar, brother of the said Dewa. In the Will there is a recital to the effect that the bequest is made in accordance with oral directions given by Dewa. The plaintiff sought a declaration that the Will in question is void and ineffectual as against his interest and that Tika Ram, who was impleaded as defendant No. 2, will acquire no rights under the said Will. The Court of first instance dismissed the suit upon a preliminary point, holding that there had been no alienation by Umrao Kunwar of the property in her hands and that under the circumstances the mere execution of a Will would not afford a sufficient reason for granting a declaratory decree. It supported itself by a quotation from Mulla's Principles of Hindu Law. The learned District Judge on appeal has reversed the finding on the preliminary point and remanded the case for trial on the merits. He bases his decision upon the reported case of *Jarpal Kunwar v. Indar Bahadur Singh* (1). It is obvious that in that case their Lordships of the Privy Council maintained the decision of the Courts in India with considerable reluctance and carefully guarded themselves against being understood to hold that the execution of a Will, under such circumstances as the present, would afford a cause of action for a declaratory suit on the part of the nearest reversioner. It is certainly not the practice of this Court to encourage such suits, vide *Ram Bhajan Kunwar v. Gurcharan Kunwar* (2). The learned District Judge, moreover, while purporting to follow the Privy Council ruling quoted by him, has really departed from the spirit of that ruling by interfering with the decision of the Court of first instance. We think that the learned Addi-

(1) [1904] 26 All. 238=31 I. A. 67=8 C. W. N. 465=6 B. M. L. R. 495=14 M. L. J. 1490 (P. C.).

(2) (1905) 27 All. 14=1 A. L. J. 468=1904 A. W. N. 150.

tional Subordinate Judge was right in refusing to grant the declaration sought by the plaintiff and gave good reason for his decision. We set aside the order of the Court below and restore the decree of the Court of first instance dismissing the suit. The defendants-appellants will get their costs in this Court and in the lower Appellate Court.

Appeal decreed.

A. I. R. 1915 Allahabad 253

CHAMIER AND PIGGOTT, JJ.

Abdul Gaffar—Defendant—Appellant

v.

Nur Jahan Begum—Plaintiff—Respondent.

First Appeal No. 2 of 1915, decided on 28th April 1915, from the order of Dist. J., Budaun, dated 18th November 1914.

Limitation Act (9 of 1908), Arts. 62 and 120—*Suit by heir against other heirs for share of debt recovered is governed by Art. 62.*

A suit by one of the heirs of a deceased person to recover his share of the debt due to the deceased, which had been realized by another heir holding succession certificate, is governed by Article 62, and not Article 120 of the Limitation Act. [P.253, C. 2]

A. Haider—for Appellant.

Sundar Lal—for Respondent.

Judgment.—This is an appeal against an order of remand passed by the District Judge of Budaun. The facts are that one Najmuddin died in July 1901 leaving a widow, Zebunnissa, a brother, Hamiduddin, and two nephews, Abdul Gaffar and Zahiruddin. In March 1903 Abdul Gaffar obtained a succession certificate in respect of the debts due to the deceased. Zahiruddin died in 1906 and his rights devolved directly or indirectly upon the plaintiff-respondent, Nur Jahan Begum, who in July 1913 brought the present suit against Abdul Gaffar claiming an account of all sums received by him as holder of the succession certificate and payment of what might be found due to her. The Subordinate Judge dismissed the suit, holding that it was governed by Article 62 of the first Schedule to the Limitation Act, and was barred by that Article, inasmuch as it was proved that no sum had been received by Abdul Gaffar within three years of the suit. On appeal the District Judge held that the suit

was governed, not by Article 62, but by Article 120 and remanded the suit for trial on the merits.

The District Judge has relied upon the decision of this Court in *Umardaraz Ali Khan v. Wilayat Ali Khan* (1). The facts of that case do not differ in essential particulars from the facts of the present case, except that the defendant in the present case obtained a succession certificate whereas the defendant in that case does not seem to have done so. The Court was disposed to follow the decision in *Kundan Lal v. Bansī Dhar* (2), but considered itself bound by the decision of the Privy Council in *Mahomed Riasat Ali v. Hasin Banu* (3) to hold that the suit was governed by Article 120. It seems to us that the decision of the Privy Council in the case mentioned had no application to the facts of the case of *Umardaraz Ali Khan v. Wilayat Ali Khan* (1). The case before the Privy Council was one in which the widow of one Mosheraf Ali claimed the moveable and immoveable property of her husband from a brother of the deceased who had taken possession. Their Lordships held that the claim to cash and moveables was governed by Article 120. Article 62, which, of course, had no application to the claim for moveables, does not seem to have been mentioned at all. The cash in question had not been received from any one, but had been seized by the defendant upon his brother's death. We do not think that the decision of the Privy Council obliges us to hold that such a case as this is governed by Article 120. In the recent case of *Amina Bibi v. Najmunnissa Bibi* (4), it was held that a suit like the one before us was governed by Article 62. In his judgment in that case Tudball, J., referring to the case of *Umardaraz Ali Khan v. Wilayat Ali Khan* (1), said that Article 62 was not mentioned at all in the judgment in that case, but he must have overlooked the last paragraph of the judgment at page 172 of the report, where Article 62 was mentioned and was held to be inapplicable on the strength of the decision of the Privy Council. The decision in the case of *Umardaraz Ali Khan v.*

(1) (1897) 19 All. 169=1897 A.W.N. 34.

(2) (1881) 3 All. 170.

(3) (1894) 21 Cal. 157=20 L.A. 155 (P.C.)

(4) (1915) 37 All. 233=27 I.C. 712.

Wilayat Ali Khan (1) is a direct authority in favour of the respondent's contention, but for the reason already stated we think that the Court was wrong in supposing that the point was covered by the decision of the Privy Council. We prefer the later decision in the case of *Amina Bibi v. Naj-munnissa Bibi* (4), which is supported by the decisions in *Parsotam Rao v. Radha Bai* (5), *Masihuddin v. Imtiazunnissa Bibi* (6) and *Mahomed Wahib v. Mahomed Ameer* (7). The circumstance that the defendant-appellant held a succession certificate does not appear to us to differentiate the case from cases in which one of several heirs receives payment of a debt due to the deceased, though he does not hold a succession certificate.

In our opinion the Subordinate Judge was right in holding that the suit was barred by limitation. We allow this appeal, set aside the order of the District Judge and dismiss the suit with costs throughout. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(5) (1915) 28 I.C. 953.

(6) (1915) 27 I.C. 533 = 37 All. 40.

(7) (1906) 32 Cal. 527 = 1 C.L.J. 167.

A. I. R. 1915 Allahabad 254

BANERJI, J.

Mathra Pershad and another—Defendants—Appellants

v.

Cheddi Lal—Plaintiff—Respondent.

Second Appeal No. 554 of 1914, decided on 21st April 1915, from the decision of Dist. J., Allahabad, dated 2nd April 1914.

Evidence Act (10 of 1872), *Ss. 68 and 72*—*Not properly attested mortgage deed is admissible as money bond.*

Where a mortgage-deed is not properly attested in accordance with the provisions of Section 59 of the Transfer of Property Act, it is not admissible in evidence as a mortgage-deed but it is admissible in evidence as a simple money-bond. 1 I. C. 1; 26 Cal. 78 and 30 Mad. 251 Foll. and 18 I. C. 311 Dist. [P. 255, C. 2.]

Umashanker Bajpai—for Appellants.

G. L. Agarwala—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiff-respondent to realise the amount of a bond, dated the 23rd of August 1910, alleged to have been executed by one Ramdhan Lal in favour of the plaintiff and his deceased father, Ramadhin. Ramdhan Lal is dead. The

suit was brought against the appellants who are in possession of Ramdhan Lal's property under a Will. The bond on the face of it purported to be a mortgage bond and the suit was brought in the Court of first instance to enforce the mortgage. That Court was of opinion that the document had not been duly attested as required by Section 59 of the Transfer of Property Act and could not be treated as a mortgage. For that reason alone the Court dismissed the suit. The plaintiff appealed and in the Appellate Court he abandoned the claim for sale of the mortgaged property and asked for a simple money decree in respect of the debt. The learned Judge found that the document had been duly executed by Ramdhan Lal and that he had received the amount of it which was paid in the presence of the Sub-Registrar. He made a money-decree in favour of the plaintiff, to be recovered from the assets of Ramdhan Lal in possession of the defendants-appellants. This appeal has been preferred by the defendants and the only contention on their behalf is that in view of the provisions of Section 68 of the Evidence Act the bond was not admissible in evidence for any purpose. I am unable to agree with this contention. As a mortgage it was undoubtedly necessary that the document should be attested by at least two witnesses and that one of those witnesses should be called. But it appears from the evidence of the scribe and of the witness Mata Ghulam that the document in question was not attested at all. On the contrary the scribe proved that Ramdhan Lal signed the document at the house of the scribe where it was written, and took it to the witnesses afterwards and got their signatures on it after admitting execution. This evidence of the scribe shows that the document was not attested in accordance with the provisions of Section 59 of the Transfer of Property Act. Therefore it could not be treated as a mortgage. It is only in the case of a document which required to be attested and was attested that under Section 68 of the Evidence Act it was necessary to call an attesting witness, as the document in this case was not so attested, Section 68 had no application, and the case, in my opinion, fell within the purview of Section 72 of the Evidence Act. For a simple money bond it is not

necessary that it should be attested by witnesses. As the bond in this case was not so attested it was a valid document as a simple money bond and was admissible in evidence. This was held by a Full Bench of the Madras High Court in the case of *Pulaka Veetil Muthalakulangara Kunhu Moidu v. Thiruthipalli Madava Menon* (1) and by the Calcutta High Court in *Tofaluddi Peada v. Mahar Ali Shaha* (2). The case of *Veerappa Kavundan v. Ramasami Kavundan* (3), has, under the circumstances mentioned above, no application to the present case and it is unnecessary for me to say whether I agree with the decision in that case. There can be no doubt that the bond in this case contained a personal covenant and the plaintiff is entitled to a money decree in enforcement of that covenant. The learned Vakil for the appellant has referred to the Full Bench ruling of this Court in *Collector of Mirzapur v. Bhagwan Prashad* (4), but that case has apparently no bearing on the case before me. The terms of the document in that case were peculiar and it was held that under those terms there could not be a personal decree against the executant of the document. The appeal is, in my opinion, without force. I dismiss it with costs including fees on the higher scale.

Appeal dismissed.

(1) [1905] 1 I.C. 1=32 Mad. 410.

(2) [1899] 26 Cal. 78.

(3) [1907] 30 Mad. 251=17 M.L.J. 213=2 M. L.T. 175.

(4) [1913] 18 I.C. 311=35 All. 164.

A. I. R. 1915 Allahabad 255

CHAMIER AND PIGGOTT, J.J.

Mst. Lakhpati — Defendant — Appellant

v.

Rambodh Singh — Plaintiff — Respondent.

Second Appeal No. 1532 of 1913, decided on 24th March 1915, from the decision of the Dist. J., Benares, dated 17th May 1913.

(a) *Hindu law—Reversioner—Widow's daughter is no impediment to reversioner's suit for declaration of widow's alienation not being binding.*

The presence of a daughter is no bar to a suit for declaration, by a reversioner to the estate of a Hindu widow that an alienation made by her is void.

[P. 256, C. 1.]

(b) *Hindu law—Reversioner—Consent—Attestation does not import consent but it may be proved otherwise.*

Mere attestation of an instrument by a reversioner does not necessarily import concurrence by him. It may, no doubt, be shown by other evidence that when the reversioner became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise.

[P. 256, C. 1.]

(c) *Evidence Act (1 of 1872), S. 115—Whether attestation implies consent is question of fact—It depends upon circumstances.* 19 M. I. A. 209 (P.C.) Foll.

The question whether the attestation of a document should be held to be simply assent is a question of fact and must be determined with reference to the circumstances of each case. 21 I.C. 867 and 5 I.C. 252 Foll. [P. 256, C. 2]

S. C. Banerji—for Appellant.

Tej Bahadur Sapru and *S. N. Sen*—for Respondent.

Judgment.—The facts of this case are that *Musammatt Kulwanti*, the widow of a separated Hindu, Jita, mortgaged her husband's property to the appellant by two deeds of January 28th, 1907; and August 7th, 1908. At the time of these transactions there were living Sarju Dei, who is said to be a daughter of Jita, Budhai, the son of a deceased brother of Jita, and Ram Raj and Ram Bodh, sons of another deceased brother of Jita. The three nephews were the sole presumptive reversionary heirs of Jita. Ram Bodh was a minor living in union with his brother, Ram Raj, who joined in executing both mortgages, and Budhai attested both as a witness. Ram Bodh who is still a minor brought this suit in 1910 for a declaration that the mortgages were not binding upon him. The Subordinate Judge held that the earlier mortgage was not proved to have been made for lawful necessity at all, and that the later mortgage was proved to have been made for lawful necessity to the extent of Rs. 282 out of Rs. 800, but he held that Ram Bodh was bound by his elder brother's consent to the transactions, and that Budhai's consent to them was proved by the fact that he attested them. Therefore, the whole body of male reversioners must be taken to have consented to the transactions, and the plaintiff was not entitled to challenge them. On appeal the District Judge agreed with the first Court as to the extent to which the mortgages had been shown to be supported by legal necessity, but he held

that the attestation of the deeds by Budhai did not prove that he had consented to the mortgages and that the plaintiff was not bound by the elder brother's consent, because it had been neither alleged nor proved that he had acted for the benefit of the plaintiff. Both Courts below have held that the presence of a legitimate daughter of Jita, even if proved, did not prevent the plaintiff from maintaining the suit. The learned District Judge gave the plaintiff a declaration that the earlier deed was not binding upon him and that the later was binding only to the extent of Rs. 282. This is a second appeal by the mortgagee. On the authorities it is quite clear that the presence of the daughter, even if proved to be legitimate, is no bar to the maintenance of the suit by the plaintiff.

It appears to us that the only difficulty in the case arises from the finding of the District Judge that the attestation of the deeds by Budhai does not prove that he consented to the transactions. If Budhai consented to them, then we have the consent on the part of all the adult male reversioners, and it is clear that such consent is sufficient to raise the presumption that the mortgages were made for purposes binding upon the whole body of reversioners. It is contended on behalf of the plaintiff respondent that the finding of the District Judge, that Budhai is not proved to have consented to the mortgages, is a finding of fact which cannot be disturbed in second appeal, while the appellant contends that it is not a finding of fact but that the question is, what is the true conclusion to be deduced from the fact that Budhai attested the execution of the mortgages. In our opinion the finding of the learned Judge is one of fact which cannot be disturbed in second appeal. In a well-known case decided as long ago as 1869 their Lordships of the Privy Council said that mere attestation of an instrument by a person did not necessarily import concurrence by him. It might no doubt be shown by other evidence that when he became an attesting witness, he fully understood what the transaction was, and that he was a concurring party to it, but from the mere subscription of his name that inference did not necessarily arise [*Raj Lukhee*

Dabea v. Gokool Chunder Chowdhry (1)] and it has been held, in several cases by different Courts in India, that the question whether the attestation of a document should be held to simply assent is a question of fact, and must be determined with reference to the circumstances of each case, see for example *Deno Nath Das v. Kotiswar Bhattacharya* (2) and *Mewa Singh v. Bhagwant Singh* (3).

We must, therefore, accept the finding that Budhai is not proved to have assented to the transactions in question, and it follows that it is not proved that there was such assent on the part of the reversionary body as to raise a presumption that the mortgages were made for purposes binding on the reversioners. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1869-70) 13 M.I.A. 209=12 W.R. 47=2 Suth. P.C.J. 275=2 Sar. P.C.J. 518=20 Eng. Rep. 529 (P.C.)

(2) (1913) 21 I.C. 367.

(3) (1910) 5 I.C. 252.

A. I. R. 1915 Allahabad 256

CHAMIER AND PIGGOTT, JJ.

Afzul Shah—Defendant—Appellant

v.

Muhammad Abdul Karim Khan—Plaintiff—Respondent.

First Appeal No. 108 of 1914, decided on 5th February 1915, from the order of the Addl. D. Sub-J., Aligarh, dated 15th April 1914.

Agra Tenancy Act (2 of 1901), S. 197—*Subordinate Judge to exercise appellate powers in hearing appeal transferred.*

Where a District Judge transfers an appeal to a Subordinate Judge the latter may exercise all the powers vested in an Appellate Court by Section 197 of the *Agra Tenancy Act*. 16 All. 363 (F. B.); Foll. [P. 257. C. 2]

M. L. Agarwala—for Appellant.

Shafuzzaman—for Respondent.

Judgment.—This is an appeal against an order of the Additional Subordinate Judge of Aligarh, setting aside a decree passed by the Munsif of Bulandshahr and remanding the suit to the Munsif's Court to be disposed of according to law. The Munsif had held that the suit was not cognizable by a Civil Court and had on that ground dismissed it. The plaintiff appealed to the District Judge, who transferred the appeal to the first Additional Subordinate

Judge for disposal. The latter officer was of opinion that the suit had been rightly instituted in the Civil Court and remanded the case to the Munsif for trial on the merits. In appeal to this Court it is contended that the suit was not cognizable by the Civil Court and that the Subordinate Judge had no power to make the order of remand. It is conceded that if the order of remand had been made by the District Judge, the case would have been covered by S. 197 of the Tenancy Act and no objection could have been taken to the order; but it is contended that the Subordinate Judge had no power to act under that section. The case is covered by the decision in the case of *Babu Nandan Prasad v. Chanpur* (1). On the authority of that ruling we must hold that the Additional Subordinate Judge had power to make the order of remand. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1894) 16 All. 363—1894 A.W.N. 113 (F.B).

A. I. R. 1915 Allahabad 257

RICHARDS, C. J. AND BANERJI, J.

Robert William Anderson—Defendant
—Appellant

v.

Bank of Upper India Ltd.—Plaintiff—Respondent.

First Appeal No. 293 of 1913, decided on 6th April 1915, from the decree of the Sub-J., Bareilly.

Transfer of Property Act (4 of 1882), S. 58—Mortgage of good will and stock-in-trade agreed not to be sold—Stock sold and replaced—New stock held not affected by mortgage.

A certain person mortgaged the good-will and the stock-in-trade of his business. A list of the stock-in-trade was scheduled to the mortgage-deed. There was a clause in the deed that the stock-in-trade would not be transferred. The scheduled stock was, as a matter of fact, subsequently, sold and was replaced by another:

Held, that the stock-in-trade which was acquired after the mortgage was not affected by the mortgage. *Tapfield v. Hillman* (1843) 134 E. R. 883. *Foll. and Colman v. Chamberlain* (1890) 59 L. J. Q. B. 563 Ref. [P. 259, C. 1]

Sundar Lal—for Appellant.

B. E. O'Connor and P. N. Banerji—for Respondent.

Judgment.—This appeal arises out of a suit brought by the Bank of Upper India claiming that they might be put into possession of the chattels, goods, stock-in-trade, book-debts, securities and moneys

and the business belonging to a firm of merchants carrying on business under the style of *Burton & Co.* at Bareilly, or in the alternative that the Bank should have a decree for the sum of Rs. 18,839-5-6 against the defendants jointly and severally and that in default of payment the business should be sold for the realisation of their debt.

The Court below has given the plaintiff Bank a decree directing the defendants to pay the sum of Rs. 18,839-5-6 together with interest and costs, and further that in the event of the amount in the hands of the Receiver (who had already been appointed) not being sufficient to pay the plaintiff's decree, the Receiver should call for tenders and sell the business of *Messrs. Burton & Co.* with the "good-will", etc., as a going concern.

We are informed that in execution of this decree the business has been sold as a going concern.

The defendant *Robert William Anderson* has appealed. The Bank's claim is based on a deed, dated the 11th of August 1911, executed by the defendant *Graham* in favour of the Bank of Upper India. The document commences by reciting that the said *Graham* was indebted to the Bank and other persons and required a loan of Rs. 11,000. Then follows a covenant to re-pay the Rs. 11,000 by instalments. There is a clause which provides "if for the preservation of the security hereby created it be necessary for the said Bank to make any advance or to incur any other charge, such advance or charge shall form part of this loan and be subject to the same stipulation about interest." The document then proceeds as follows: "and this indenture further witnesseth that for the due re-payment of the money due under these presents and other charges as above specified and interest or both as above stated and agreed upon, the said mortgagor doth hereby mortgage unto the said Bank, its executors and administrators and assigns all and singular the several chattels, goods, stock-in-trade and things specially described in the schedule hereto annexed, by way of security for the re-payment of the loan and interest and charges thereon as stipulated above. Further he, the mortgagor, as beneficial owner doth hereby mortgage unto the said Bank, its executors, administrators or assigns all the beneficial

interest of the said business of Messrs. Burton & Co. with the fixtures appertaining thereto and also all the book-debts and other debts now due and owing to the said Percy Hubert Graham or Messrs. Burton & Co. upon account or in respect of the said trade or business and all securities for the same, to hold the same unto the said Bank, its executors, administrators or assigns for securing payment of the loan and interest thereon as stipulated." There is a further clause authorising the Bank in the event of default to take over the property mortgaged. (This power was admittedly never exercised). There was a further clause mortgaging or charging a certain policy of insurance of the life of the said Percy Hubert Graham and finally a clause (hopelessly inconsistent with the entire object of the deed) that the mortgagor would not alienate any of the property mortgaged during the continuance of the security. Attached to this deed is a schedule of the goods which formed the stock-in-trade of Graham's business at the time of the mortgage.

The appellant, Anderson, who was connected by marriage with Graham, got a deed from the latter on the 31st of August 1912. This document recites that Graham was indebted to Anderson in the sum of Rs. 22,854. This sum was made up of Rs. 15,000 advanced at the time in cash, Rs. 3,750, promissory notes executed in favour of Anderson by Graham, Rs. 1,654, a decree against Graham by a creditor, and Rs. 2,450 a debt due by Graham to another firm. This document provided for interest on the Rs. 15,000 at seven per cent. It gave Anderson power to take possession of all the stock-in-trade in the business. It provided that the stock-in-trade should be kept fully replenished and all new stock which was brought in should be regarded and treated as being pawned to secure the debt. This document was followed by another document, dated the 31st of August 1912, which provided for the carrying on of the business by Graham as a manager at a salary of Rs. 200 per month, and a man of the name of Norton (who also was connected with both Anderson and Graham by marriage) should be an assistant at a salary. The deed finally provided that as soon as all debts and incumbrances had been discharged, the business should belong to Graham, Anderson and to two Nortons in certain specified shares.

There was considerable controversy in the Court below as to whether Anderson had notice of the Bank's mortgage when he made the further advance of Rs. 15,000 and got the documents of the 31st of August 1912 executed in his favour. The Court below has found that he had notice but having regard to the view we take of the case, it is quite unnecessary for us to come to any decision on the question of notice. It is contended on behalf of the appellant that all that was mortgaged by the Bank's mortgage of the 11th of August 1911 were (i) the articles which are specified and set forth in the schedule to the deed; (2) the good-will and (3) the book-debts actually due at the time, that at the time of the mortgage, and certainly at the time the Receiver took possession of the property, all the goods which were mentioned in the schedule had long before been sold in the ordinary course of business and that the plaintiff's security did not attach to any goods that might have been subsequently purchased. (The appellant makes no claim to the policy of insurance.) The appellant contends that under the terms of his indenture he was entitled to enter into possession of the business and to carry it on, that all profits made during that time, or subsequently by the Receiver, belong to him, and that the proceeds of the sale, which is said to have taken place in execution of the decree, also belonged to him. He finally contends that in no event ought there to have been a personal decree against him.

On behalf of the respondent it is contended that on the true construction of the indenture of the 11th of August 1911, any stock-in-trade which was purchased to replace the articles specified in the schedule must be regarded as part of the Bank's security, and that accordingly they are entitled to all profits in the hands of the Receiver as well as to the entire proceeds of the sale.

In our opinion it is absolutely clear that the goods and chattels described in the schedule alone were mortgaged. We think that the good-will of the business was also mortgaged. Mr. O'Connor on behalf of the respondent has cited the case of *Coltman v. Chamberlain* (1). That was a case of mortgage of a "ship and in her boats, guns, ammunitions, small arms

(1) (1890) 59 L. J. Q. B. 563 = 25 J. Q. B. D. 328 = 39 W. R. 12.

and appurtenances." The question arose as to whether sundry articles of ship's furniture purchased after the date of the mortgage were included in the security. It was held on the construction of the mortgage in that case that all these articles passed under the mortgage of the "ship" or as "appurtenant" thereto.

A case much more like the present is the case of *Tapfield v. Hillman* (2). In that case there was a mortgage of an inn together with "the furniture, stock-in-trade in, about, upon or belonging to the Inn," with a power on non-payment to the mortgagee to enter into possession of the inn and "to take, possess, hold and enjoy all the goods, chattels, effects and premises." The question arose as to whether or not stock-in-trade and goods acquired after the date of the mortgage were covered by the deed. Pattison, J., at the trial held that on the true construction of the deed only the stock-in-trade existing at the date of the mortgage was pledged. Tindal, C. J., Coltman, J., Maule, J., and Cresswell, J., all concurred in holding that the after-acquired stock-in-trade was not subject to the mortgage. Coltman, J., says "It is not improbable that the parties intended that the security of the mortgagees should extend to the stock and effects brought upon the premises from time to time to re-place that which was disposed of and consumed by the plaintiff in the course of his business. We can, however, only look to the language of the deed, which clearly is not sufficient to include property not on the premises at the time the deed was executed."

If then the plaintiff's mortgage in the present case did not attach to the subsequently acquired stock, the Bank had no right to bring anything but the "good-will" to sale, and the question whether or not Anderson had notice of their mortgage became quite immaterial. In our opinion the plaintiff Bank are not entitled to the profits in the hands of the Receiver, nor are they entitled to any portion of the proceeds of the sale, save so far as the same are attributable to or represent the "good-will" of the business. In our opinion, also, the Bank are not entitled to a personal decree against the appellant.

It is unnecessary to decide the question of the amount to realise which the Bank were entitled to bring the mortgaged property to sale. It seems to us more than doubtful that they were entitled to add to their debt any sum that was not strictly paid or advanced for the purpose of preserving their security, *e. g.*, premium paid to keep up the policy of insurance.

Before passing a final order in the case we think it desirable to refer an issue to the Court below, namely, "what portion, if any, of the proceeds of the sale represents the value of the good-will."

Issue referred.

A. I. R. 1915 Allahabad 259

RICHARDS, C. J., AND BANERJEE, J.
Hansraj—Defendant—Appellant

v.

Ratni—Plaintiff—Respondent.

Second Appeal No. 206 of 1914, decided on 12th April 1915, from the decree of the Dist. J., Saharanpur.

Limitation Act (9 of 1908), Art. 62—*Suit for money received by agent after termination of agency is governed by Art. 62.*

Where an agent receives money due to the principal after the termination of his agency, a suit to recover the same must be brought within three years from the time of the receipt as money had and received. [P. 260, C. 1]

Surendra Nath Sen—for Appellant.

Jawahar Lal Nehru for *Moti Lal Nehru*—for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff prayed for an account of certain income which the defendant is alleged to have received as her agent and for a decree for the amount of such income when ascertained, and also for the recovery of papers and books containing the names of *jajmans*. The plaintiff's case was that her husband was a *Ganga-purohit* at Hardwar, that on his death she handed over the books, etc., to the defendant, who undertook to make use of them as her agent and to pay her over the income which was derived from pilgrims. There had been previous litigation between the parties commencing in the year 1905 and finally decided by the High Court in 1910. The decision was altogether favourable to the plaintiff, who was held to be entitled to the books and to the amount received by the defendant. The present suit was instituted on the 10th of February 1911. The relief

(2) (1843) 6 Man. & G. 245 = 6 Scott (N.B.) 67
= 12 L. J. C. P. 311 = 7 Jur. 771 = 134 E. R.
883.

claimed is substantially the same as that claimed in the previous suit, the difference being that an account was claimed for the period between the institution of the previous suit and the commencing of the present.

Both Courts have held in favour of the plaintiff. On the general merits we entirely agree with the decision of the Court below. As to the decree, however, we feel that it must be modified. The plaintiff had determined any agency which existed between her and the defendant in the year 1905. From that time on the defendant in no way collected the income as the agent of the plaintiff. He did not hold himself out as her agent; on the contrary he was insisting upon collecting the income on his own behalf, wrongly making use of the books which contained the names of the pilgrims. In our opinion the only form of the suit in which the plaintiff is entitled to relief is for money had and received by the defendant for her use. Article 62 of the Limitation Act provides that such a suit must be brought within three years from the time of the receipt of the money. We must accordingly modify the decree of the Court below by directing that the accounts shall be limited to an account of the income received three years before the institution of the present suit. In all other respects we affirm the decree of the Court below. As the appeal has substantially failed, the appellant must pay the costs of the respondent.

Decree modified.

A. I. R. 1915 Allahabad 260

RICHARDS, C. J., AND TUDBALL, J.

Zamir Ahmad and another—Defendants—Appellants

v.

Abdul Razzik and others—Plaintiffs—Respondents.

First Appeal No. 10 of 1914, decided on 20th May, 1915, from the order of the Addl. J., Moradabad.

Pre-emption—*Wajib-ul-arz* giving right to *khalsa* and *malik* but not giving incidents of custom—*Held* right co-extensive with *Mahomedan Law*.

Where a *wajib-ul-arz* provided that a right of pre-emption existed among the owners of the *khalsa* separately and among the owners of the

milak separately but gave no incidents of the custom of pre-emption.

Held, that the right was co-extensive with that given by the *Muhammadan Law*. [P. 261, C. 1]

Surendro Nath Sen—for Appellants.

B. E. O'Connor—for Respondents.

Judgment.—This is an appeal arising out of a suit for pre-emption in respect of a certain *zemindari* situate in the village of Katra. Originally this village consisted of two *mahals*, one of $11\frac{1}{2}$ *biswas* and one $8\frac{1}{2}$ *biswas*. The $8\frac{1}{2}$ *biswas mahal* was subsequently divided into two *mahals*, one of $3\frac{1}{2}$ *biswas* and one of 5 *biswas*. The 5 *biswas mahal* (which is now a 20 *biswas mahal*) belonged one-half to the vendors and one-half to the pre-emptors. The vendors have sold their half share to a stranger. The pre-emptors brought their suit to enforce their right, alleging (a) in paragraph 3 of their plaint, that the "custom of pre-emption prevailed among proprietors of the *khalsa*" as entered in the *wajib-ul-arz* of the village and also (b) (as set out in paragraph 6 of the plaint) that directly he "got the news of the sale he fulfilled the conditions by the *Muhammadan Law* for pre-emption" and called upon the defendant to transfer the pre-empted property to him for the price entered in the sale-deed. The defendants met the case first of all by denial that there was any custom of pre-emption in the village at all, or that the plaintiffs had a right of pre-emption on the basis of the *wajib-ul-arz* to which the provisions of the *Muhammadan Law*, applied, that the plaintiffs had not in any way fulfilled the necessary demands. It was alleged that the plaintiffs had actually refused to purchase the property after full notice and, therefore, if they had had any right they had lost it. Five issues were framed, the first:—Does the custom of pre-emption prevail in *Mauza Katra*? This the Court below decided in favour of the plaintiffs and the decision is not seriously contested here. The second issue was:—"If so, what are the incidents of the custom, whether those arising under the *Muhammadan Law* or not?" On this issue the Court held that the rules of *Muhammadan Law* did not apply. Issue three was:—"Under the custom (if any) found to prevail is the plaintiff entitled to pre-empt?" This issue was found in the affirmative.

The *fourth* issue:—"Have the plaintiffs performed the preliminaries necessary to pre-emption under the Muhammadan Law?" This issue was left undecided as being unnecessary in view of the finding on the second issue, and consequently evidence on this issue was not taken. The *fifth* issue was:—"Did the sale take place with the plaintiffs' knowledge and after their refusal to purchase. If so, is their right of pre-emption lost?" On this point the Court below held in favour of the plaintiffs.

The sole point which has been argued before us is, whether or not the rule of Muhammadan Law applied in the present case. It is pointed out that in the *wajib-ul-arz* the custom as set forth is laid down in the following words:—"among the owners of the *khalsa* separately and among the owners of the *mulak* separately the custom of pre-emption is in vogue," that no incidents of the custom are set forth and that, therefore, the principle that has been laid down in a long series of rulings of this Court should be applied and in such cases the rule of Muhammadan Law must be followed. The latest decision on the point is to be found in *Jugdam Sahai v. Mahabir Prasad* (1). The judgment therein refers to *Ram Prasad v. Abdul Karim* (2), and it is an admitted fact that those rulings have been consistently followed in this Court. The lower Appellate Court has tried to distinguish the present case from those quoted, on the ground that the *wajib-ul-arz* stated that the right of pre-emption exists among the owners of each class of property as such, but if the *wajib-ul-arz* had merely stated that the custom existed, the learned Additional Judge would have felt bound by the rulings cited and would have applied the Muhammadan Law in the case. We do not think that the language of the present *wajib-ul-arz* is such as to enable us to distinguish it from those in the cases quoted. The meaning of the document is simply this, that among the co-sharers of the *khalsa* the custom of pre-emption prevailed. None of the incidents are set forth and it seems to us clearly a case in which the right is co-extensive with that given by the Muhammadan Law. We,

therefore, before deciding the case, must have a decision by the Court below on the fourth issue framed by it. The parties will be allowed to give fresh evidence on that point relevant to the issue. Ten days will be allowed on receipt of the finding for objection.

Issue remitted.

A. I. R. 1915 Allahabad 261

PIGGOTT, J.

Dori Lal—Plaintiff—Applicant

v.

Sewak Ram and another—Defendants
—Respondents.

Civil Revn. Petn. No. 24 of 1915, decided on 23rd April 1915, from the order of the Sub-J., Pilibhit.

Negotiable Instruments Act (26 of 1881), S. 78—*Person entitled to possession of promissory note negotiable or not is entitled to sue.*

A person who is entitled to the possession of a promissory note in his own name is alone entitled to sue upon it whether the instrument be negotiable or not. 28 Mad. 205 and 18 M. L.J. 186 Ref. [P. 202, C. 1.]

Gulzari Lal—for Appellant.

Sarat Chandra Chaudhri—for Respondents.

Judgment.—This suit was brought upon a promissory note executed in favour of one Ram Narain. The plaintiff claims to be the true owner of the instrument from the time of its execution, and alleges Ram Narain to have been a *benamidar* for himself. He has also impleaded as defendants the heirs of the ostensible payee. After the suit had been decreed by the first Court, it was dismissed by the learned Subordinate Judge of Pilibhit, on the ground that only the ostensible payee can maintain a suit upon a promissory note. The Subordinate Judge has supported himself by authority of a Madras case, in respect of which it is contended here that the learned Judges who decided that case were referring specifically to a negotiable instrument as defined in Section 13 of the *Negotiable Instruments Act* (XXVI of 1881). I find, however, that there is clear authority of the same Court on the same point in *Ramanuja Ayyangar v. Sadagopa Ayyangar* (1) and in *Subramanya Tevan v. Arunachala Tevan* (2). According to Section 78 of the *Negotiable Instruments Act*, only the holder of a promissory note can receive payment

(1) (1906) 28 All. 60 = 2 A.L.J. 482 = 1905 A.W.N. 190.

(2) (1887) 9 All. 518 = 1887 A.W.N. 146.

(1) (1905) 28 Mad. 205 = 25 M.L.J. 249.

(2) (1908) 18 M.L.J. 186.

of the same so as to discharge the maker, and this section applies whether the promissory note in question was negotiable or not. The "holder" of a promissory note is defined in Section 8 of the same Act, and means a person entitled in his own name to the possession thereof. In the absence of any ruling to the contrary, I am certainly not prepared to hold that the learned Subordinate Judge acted with material irregularity in the exercise of his jurisdiction in applying to the decision of the question of law raised by the pleadings before him a principle which has been specifically laid down by one at any rate of the High Courts in India, and not dissented from by the Court to which he is subordinate. I dismiss the application with costs.

Application dismissed.

A. I. R. 1915 Allahabad 262

CHAMIER AND PIGGOTT, JJ.

Kheshtupal Sharma—Plaintiff-Applicant

v.

Pancham Singh Varma—Defendant-Respondent.

Civil Revn. Petn. No. 148 of 1914, decided on 7th May 1915, from the order of the Dist. J., Agra.

(a) *Trade mark*—If can be infringed by advertisement.

A trade-mark can be infringed by means of advertisement. [P. 262, C. 2.]

(b) *Civil P.C.* (5 of 1908), S. 20—Cause of action—Infringement of Trade-mark.

The cause of action for infringement of trade-mark arises partly where the advertisement is published and distributed. [P. 262, C. 2.]

Tej Bahadur Sapru and *Moti Lal Nehru*—for Applicant.

Sundar Lal—for Respondent.

Judgment.—This is an application for revision of an order of the District Judge of Agra, confirming an order of the Subordinate Judge of Muttra directing that the plaint be returned to the plaintiff for presentation to the proper Court. The suit was one by the applicant for damages on account of alleged infringement by the defendant of the applicant's trade-mark. The applicant has for a considerable time been selling a medicine under the name of *Sudha Sindhu* which, we understand, means 'Ocean of nectar' in the course of his business at Muttra. He sells chiefly on V. P. P. orders received in response to

advertisement which he puts in the papers. The respondent, who is a resident of Gaya, sells a medicine which he calls *Asli Sudha Sindhu* in the same way. The applicant's case is that his trade-mark which has been duly registered has been infringed by the respondents. The alleged infringement is an advertisement of the respondent's medicine in papers published in Muttra and in circulars and hand-bills distributed in the same place. The Courts below have held that the suit should have been brought in Gaya. They have treated it as a question of convenience rather than as a question of law. But if the applicant can show that the cause of action arose wholly or in part within the limits of the jurisdiction of the Subordinate Judge of Muttra, he is entitled to maintain his suit in Muttra. The question is whether the publication of the advertisement by the respondent of his medicine, *Asli Sudha Sindhu*, in papers, hand-bills and circulars published in Muttra is an infringement of the applicant's trade-mark. For the purpose of this application we must, of course, assume that the applicant is entitled to the trade-mark which he claims and that the respondent's advertisement is calculated to induce people to believe that they will get from him the applicant's 'medicine'. No authority has been produced in support of the argument that such an advertisement cannot be an infringement of the trade-mark. On the other hand several English cases have been cited which show that it has been held for some years past that a trade-mark may be infringed by means of an advertisement. We think it is sufficient to refer to decisions in *Jay v. Ladler* (1), *Bourne v. Swan and Edgar Limited* (2), and to the injunction which was issued by the House of Lords in the case of *Reddaway v. Banham* (3). On the authorities we must hold that if the facts are as alleged by the applicant, his trade-mark has been infringed within the jurisdiction of the Subordinate Judge of Muttra. We, therefore, allow this application, set aside the orders of the Courts below and direct that the record be returned to the Court of first instance

(1) (1888) 40 Ch. D. 649=60 L. T. 27=37 W. R. 505.

(2) (1903) 1 Ch. 211=72 L. J. Ch. 168=51 W. R. 218=87 L. T. 549=15 T. L. R. 59=20 R. P. C. 105.

(3) (1896) A. C. 199=65 L. J. Q. B. 381=7 L. T. 289=44 W. R. 638.

and the suit restored to the pending file to be disposed of according to law. Costs here and hereto will be costs in the cause.

Application allowed.

A. I. R. 1915 Allahabad 263

RICHARDS, C. J. AND BANERJI, J.

Mahmud Ali and others—Defendants—Appellants

v

Yawar Beg—Plaintiff-Respondent.

Second Appeal No. 352 of 1914, decided on 1st June 1915, from the decree of the Dist. J., Benares, dated 14th January 1914.

Specific Relief Act (1 of 1877,) Ss. 15 and 16—Agreement to sell whole by owner of half share in house—Specific performance of half on payment of full price can be decreed.

The defendant No. 1 on behalf of himself and as agent of the defendant No. 2 agreed to sell a house, in which each of the two defendants had one-half share, to the plaintiff. Defendant No. 1 had no authority to sell the half share of defendant No. 2. The plaintiff sued for specific performance of the contract:

Held, that the plaintiff was only entitled to a decree for specific performance for half the house on condition of paying the full price agreed upon for the entire house. [P. 263, O. 2.]

M. L. Agarwala and W. Wallach—for Appellants.

S. M. Sulaiman—for Respondent.

Judgment.—This appeal arises out of a suit for specific performance of a contract to sell a house. The house belonged to Sheikh Muhammad Ali and Sheikh Muksud Ali, the defendants Nos. 1 and 2. It is alleged that the defendant No. 1 on behalf of himself and as agent of defendant No. 2 agreed to sell the house to the plaintiff, that then in breach of the agreement the house was sold to defendant No. 3, the sale being taken fictitiously in the name of his wife, defendant No. 4.

The Court below has found that the contract was entered into but that defendant No. 1 had no authority to sell his brother's share of the house. The Court accordingly made a decree for specific performance in respect of the half of the house which belonged to defendant No. 1, at half the price agreed upon.

In second appeal it is contended on behalf of the defendants that the Court ought not to have decreed specific performance of half the house. Section 15 of the Specific Relief Act is relied upon, and it is contended that the plaintiff was only entitled to a decree for specific

performance for half the house on condition of paying the full price agreed upon for the entire house. On the other hand, the plaintiff relies on the provisions of Section 16. The Court below considered that this section applied. The section is as follows: "When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part."

It must be remembered that the contract as proved was a contract to sell the whole house for one lump sum as consideration. It can hardly be said that the contract consisted of "two parts, each standing on a separate and independent footing from the other," one part being to sell the share of defendant No. 1 and the other part to sell the share of defendant No. 2. This is illustrated by supposing for a moment that the suit had been by the defendant No. 1, against the plaintiff for specific performance of a contract to buy half the house. It seems quite clear that Mirza Yarwar Beg could have pleaded that his contract was a contract to buy the whole house, and not half and that no Court would have forced him to take half the house. In our judgment the decision of the Court below was wrong. As, however, in the course of the hearing the plaintiff has expressed his willingness to pay the full price, we think that he ought to have half the house on these terms.

We accordingly vary the decree of the Court below by giving the plaintiff a decree for specific performance for sale of half the house (the share of defendant No. 1) conditional upon his paying the entire price. The plaintiff will have his costs from the defendants other than the defendant No. 2. He will be entitled to set off his costs against the amount paid by him into Court. We allow him two months to pay the money into Court, but we direct that in the event of the money not being so paid within that time the suit will stand dismissed with costs in all Courts.

Decree varied.

A. I. R. 1915 Allahabad 264**CHAMIER AND PIGGOTT, JJ.****Kamta Prasad—Decree-holder-Appellant****v.****Indomati and others—Judgment-debtors—Respondents.**

Ex. Second Appeal No. 331 of 1909, decided on 13th April 1915, from an order of the Sub. J., Mainpuri.

Benamidar transferee can execute decree—Civil P.C. (5 of 1908), O. 21, R. 16.

A *benamidar* transferee of a decree is entitled to execute it. Case Law Ref. (1907) A.W.N. 39, applied.

Sunilar Lal and Satish Chandra Banerjee—for Appellant.

Tej Bahadur Sapru, Moti Lal Nehru, Gokal Prasad, Baldeo Ram, Purushottam Das Tandon, Parmeshwar Dayal, Rama Kant Malaviya and Iqbal Ahmad—for Respondents.

Judgment.—These are appeals against an order of the Subordinate Judge of Mainpuri, rejecting an application presented by the appellants for an order absolute under Section 89 of the Transfer of Property Act. A decree *nisi* was passed in favour of two persons, Sheo Prasad and Tulsi Ram, on December 24th, 1900, and was confirmed on appeal by this Court with a slight modification on January 19th, 1914. That decree was passed against *Musammatt Indomati* and others. The business of the decree-holders failed and their rights under the decree were put up for sale in execution of a decree held against them by Moti Lal and Fateh Lal. At the execution sale the share of the decree-holder, Sheo Prasad, was sold to one Ram Bhargose and the appellants assert that on September 27th, 1905, the rights of Ram Bhargose were transferred to Bisheshwar Nath and that on May 3rd, 1906, Bisheshwar Nath transferred his rights to Kamta Prasad, the appellant in Appeal No. 331. At the same execution sale the share of the decree-holder, Tulsi Ram, was sold to Ajudhia Prasad. Badlu Ram, the appellant in Appeal No. 332, says that on March 31st, 1905, Ajudhia Prasad transferred to him all his rights under the decree. The appellants, therefore, applied to the Court below for the passing of an order absolute in the capacity of transferees of the decree. The application was resisted by the judgment-debtors on the ground that

the applicants were *benamidars* and, therefore, could not maintain the application. The Court below on the question of fact has held that the appellants are no more than *benamidars* for the original decree-holders, Sheo Prasad and Tulsi Ram, who, it is supposed, have re-purchased their rights under the decree in the names of other persons in order to protect those rights from attachment and sale at the instance of their other creditors. The Court below has, in accordance with the decisions of the Calcutta High Court, held that the appellants as *benamidars* are not entitled to apply for an order absolute.

In appeal it is contended that the decision of the Court below on the question of fact is erroneous. We have been taken through the evidence regarding the purchases effected by the appellants, and we think it is sufficient to say that we agree with the Subordinate Judge that it is proved that the appellants are no more than *benamidars* for other persons.

Next, it is contended that even if the appellants are *benamidars* they are entitled to maintain the application. All the reported cases upon the question whether a *benamidar* can execute a decree as the transferee thereof, seem to have been decided by the Calcutta High Court, and we have been referred in the course of the arguments to a number of them. The net result of the Calcutta cases seems to be that a *benimadar* is not entitled to take out execution of a decree as the transferee thereof, but if he succeeds in doing so his application for execution may in some cases be sufficient to save a subsequent application by the real decree-holder from the bar of limitation. The question whether a *benamidar* may take out execution of a decree as the transferee thereof does not seem to have been decided by any other High Court. But this Court, agreeing with the Bombay and Madras High Courts, and differing from the Calcutta High Court, has held that a *benamidar* may bring a suit of any kind in his own name, see *Yad Ram v. Umrac Singh* (1), which was a suit for possession *Nand Kishore Lal v. Ahmad Ata* (2) which was a suit for possession; *Bachcho v. Gajadhar Lal* (3), which was a suit for

(1) (1899) 21 All. 380=1899 A.W.N. 130.

(2) (1896) 18 All. 69=1895 A.W.N. 160.

(3) (1906) 28 All. 44=1905 A.W.N. 173=2 A.L.J. 702.

partition, and a very recent case of *Par-meshwar Dat v. Anardan Dat* (4), which was a suit for sale on a mortgage. It was pointed out by Sir Arthur Strachey in the case of *Yad Ram v. Umrao Singh* (1), cited above, that in those cases which have affirmed the right of the *benamidar* to sue, the right has been based partly on the fact that he is the transferee named in the registered instrument constituting the transfer and on the principle that the contract can be enforced by the parties who have entered into it, and partly on the view that the *benamidar* must be presumed to be suing on behalf of the beneficial owner or, to put the same idea in other words, that the suit is really brought by the beneficial owner through and in the name of the *benamidar*. It is well-established in this Court that a *benamidar* is entitled to maintain a suit. It seems to us that the principle upon which a *benamidar* has been allowed to maintain a suit applies equally to the execution of a decree. It was contended that Order 21, rule 16 shows that it is only the real transferee, that is the person beneficially interested in the transfer, who can apply for execution of a decree. We cannot accept this argument. It seems to us that the considerations which have led this Court to hold that a *benamidar* can maintain a suit apply with even greater force to an application for execution by a transferee who is a *benamidar*. The transfer is in favour of the person who applies for execution of the decree, and it seems unreasonable that the Court executing the decree should be required to enter into the question whether the ostensible transferee is the real transferee or not, and in this connection we may refer to what was said by the present Chief Justice in the case of *Intikhab Husain v. Rafi-un-nissa* (5). He observed that it might be urged with great force that whether the assignment was real or not was a matter with which the judgment-debtor was not concerned.

In the present case, there can be no doubt whatever that the application for the order absolute was put in with the full approval and consent of the persons for whom the appellants are said to be *benamidars*. In our opinion, the application

should not have been dismissed on the ground that the appellants were *benamidars*. As between the appellants and Sheo Prasad and Tulshi Ram on the one hand and the judgment-debtors on the other, we hold that the application of the appellants is maintainable. We put it in this form, because we have been told that in consequence of the decision of the Court below one Gopal Das, who held a decree against Sheo Prasad and Tulshi Ram, has in execution of that decree attached, brought to sale and purchased himself the rights of Sheo Prasad and Tulshi Ram under the decree *nisi* of January 1904, and we have also been informed that the present appellants have brought a suit for a declaration of their rights as beneficial owners of the decree *nisi*. It will be for the Court below to consider and determine the effect of the alleged purchase by Gopal Das and of any decision that may be arrived at in the suit brought by the appellants for a declaration of their rights. We would also point out that Gopi Narain and others resisted the application for an order absolute, on the ground that they are purchasers of two-thirds of a village called Pale Kalan, and they say that the suit was dismissed by the High Court against them and their property. This is a point which must be taken up and decided by the Court below.

We set aside the order of the Court below and sending the case back to that Court we direct that the appellants' application be restored to the pending file and disposed of according to law. Costs of this appeal will be costs in the cause.

Appeal decreed : Cause remanded.

A. I. R. 1915 Allahabad 265

RICHARDS, C.J. AND BANERJI, J.

Bishrup—Plaintiff—Appellant

v.

Nil Kanth—Defendant—Respondent.

First Appeal No. 393 of 1913, decided on 14th April 1914, from a decree of the Addl. Sub. J., Cawnpore.

(4) (1915) 26 I.C. 507=37 All. 113.

(5) (1907) A.W.N. 39.

Civil P.C. (V of 1908), S. 11 and O. 32, R. 15—Plea of undue influence through weak intellect and want of consideration decided against plaintiff in prior suit is res judicata in subsequent suit challenging decree in former suit on ground of plaintiff being not properly represented—Decree—Setting aside.

The defendant sued the plaintiff for the possession of certain property, the subject-matter of a sale-deed executed by the plaintiff. The plaintiff pleaded that he was of weak intellect and that advantage had been taken of him and that he had not received the consideration. The Court found against the plaintiff and decreed the defendant's suit. The plaintiff then brought the present suit to have it declared that the decree in the former suit was not binding on him as he, being of unsound mind, had not been properly represented :

Held, that the plaintiff, not having been adjudged a person of unsound mind at the time of the previous suit, was a party to that litigation, and was bound by the result. [P. 267, C. 1.]

Tej Bahadur Sapru—for Appellant.

Mudan Mohan Malaviya and Rama Kant Malaviya—for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff Bishrup by his guardian, Ram Sarup, seeks to set aside a sale-deed dated the 6th October 1906 and a decree which was subsequently obtained by the defendant for possession of the property, the subject-matter of the sale-deed. It is alleged in the plaint that Bishrup was at the time of the sale a person of unsound mind incapable of understanding what he was doing; that the defendant fraudulently took advantage of his infirmity and induced him to execute the sale-deed; that no consideration was given; that the property was worth Rs. 10,000, while the amount of consideration was only Rs. 5,500. Then follows paragraph 5 of the plaint, which contains allegations which under certain circumstances might have been of considerable importance. It is there alleged that the defendant brought a previous suit on the 4th of May 1909 against Bishrup as a person of sound mind, while he well knew that he was a person of unsound mind, that by fraudulent means he made a man of the name of Bhola Nath *pirokar* for Bishrup who did not put forward a proper defence on behalf of Bishrup. It appears that a suit was brought by the defendant against Bishrup on the 4th May 1909 seeking possession of the property,

the subject-matter of the sale-deed. Bishrup put in a defence to that suit, alleging that he was of weak intellect and that advantage had been taken of him and that he had not received the consideration. The sale was challenged on the same grounds as in the present suit, save the ground which relates to the value of the property. The case was tried by the Subordinate Judge of Cawnpore who went into all the facts and held, *first*, that Bishrup was not of unsound mind, and *secondly*, that the full consideration had been paid. There was an appeal to the High Court by Bishrup in his own name. After considering the evidence the High Court confirmed the decision of the Court below granting the plaintiff a decree for possession of the property. The Court below in the present suit framed six issues. The first issue was whether the suit was barred by Section 11 of the Code of Civil Procedure. There was no issue based upon the allegations contained in paragraph 5 of the plaint.

The learned Subordinate Judge decided that the previous litigation operated as *res judicata*. It is contended here that if Bishrup was in fact of unsound mind at the time the previous suit was instituted then the decision cannot possibly bind him, and it is then pointed out that since the previous litigation an enquiry has been held by the District Judge at Cawnpore and that Bishrup has been adjudged a person of unsound mind and his mother appointed guardian of his person and Ram Sarup guardian of his property. On behalf of the appellant we are asked to infer from the judgment of the District Judge that Bishrup must have been of unsound mind when the previous litigation was instituted. Sections 440 to 462 of Act XIV of 1882 (which was in force at the time of the previous litigation) provide how suits are to be brought by and against minors. Section 463 of the same Act enacts that the provisions contained in Sections 440 to 462, both inclusive, shall *mutatis mutandis* apply in the case of persons of unsound mind *adjudged to be so under Act XXXV of 1858 or under any other Act for the time being in force*. In the present Code the provisions relating to suits by and against minors are applied not only to persons adjudged to be of unsound mind, but also to persons who are

found by the Court on enquiry to be incapable of protecting their interests when suing or being sued, by reason of unsoundness of mind or mental infirmity, see Order XXXII, Rule 15. Bishrup had not at that time been adjudged a person of unsound mind. He, therefore, was a party to the previous litigation and is *prima facie* bound by the result. In this view the finding of the Court below that the previous litigation operated as *res-judicata* is correct.

It is said, however, that a decree obtained by fraud cannot operate as *res-judicata* and that the Court ought to have taken evidence of the allegations contained in paragraph 5 and that the case should be sent to the Court below for that purpose. There are two objections to this contention. In the first place, the plaintiff's advisers do not appear to have asked the Court to frame any issue on the question of fraud in connection with the previous litigation. Even in the memorandum of appeal to this Court this ground is not taken. The reasonable inference to be drawn from this is that the advisers of the plaintiff in the Court below felt that it would be impossible to sustain the allegations in paragraph 5. The whole history of the previous litigation renders it extremely improbable that the plaintiff could have adduced evidence to support the allegation that the previous suit was not fairly fought out, far less that the plaintiff in that suit by fraud prevented it from being fairly fought out. Even granted that Bishrup was not a man of strong intellect, it is quite clear that every possible defence that could be put forward on his behalf was put forward. Witnesses were called as to the condition of his mind and evidence was given as to the giving back of parts of the consideration. Legal gentlemen were employed not only in the Court of first instance but also in the High Court.

Under these circumstances, we do not think that the omission by the plaintiff's advisers to ask the Court to frame an issue on the ground of fraud was an accident or that we ought now to allow any such matter to be gone into. We dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 267

BANERJI AND RAFIQUE, JJ.

Jhandu Mal and another—Plaintiffs—Appellants

v.

Karan Singh and others—Defendants—Respondents.

Second Appeal No. 674 of 1913, decided on 26th April 1915, from a decree of the Dist. J., Agra.

Evidence Act (1 of 1872), Ss. 103 and 114—Suit on lost bond—Plea of payment—Burden of proof of payment is on defendant in spite of loss of bond when he admits execution.

Where a suit was brought on a lost bond and the defendant admitted its execution but pleaded payment:

Held, that the question of loss of the document was not material, and that it was for the defendant to prove payment. [P. 268, C. 1.]

Haribans Sahai—for Appellants.

Satish Chandra Banerjee—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs-appellants to enforce a mortgage, dated the 10th of July 1884, alleged to have been executed by Randhir Singh and Partab Singh. Randhir Singh is dead and is represented by his son, Karan Singh, and his daughter-in-law, *Musammatt Radha*, the widow, apparently, of a pre-deceased son. The share of Randhir Singh in the mortgaged property was sold to Chidammi Lal, whose minor sons, Daya Kishore and Jai Kishore, are the defendants Nos. 4 and 5. The defendant No. 2 is the mortgagor, Partab Singh, and defendant No. 3, Nahar Singh, is the son of Partab Singh. The case in our opinion was not properly tried. On the first date fixed for hearing the learned Subordinate Judge dismissed the suit for default of appearance of both parties. On the same date, i.e., the 16th of September 1911, he restored the case to his file. On that date Partab Singh and Karan Singh filed a compromise and the learned Judge proceeded to hear the case *ex parte* against the other defendants and made a decree in the terms of the compromise. Subsequently an application was

made on behalf of Nahar Singh and Musammat Radha to have the *ex parte* decree made against them set aside. This application was granted and the case was re-heard. It is clear that Musammat Radha has no interest in the suit. Strictly speaking Karan Singh also has no interest in the suit, because the plaintiff cannot enforce the mortgage against any property other than the mortgaged property and Randhir Singh's share of the mortgaged property was sold to Chidammi and is in the possession of the minor defendants, Daya Kishore and Jai Kishore. Nahar Singh filed a written statement in which he said that his father, Partab Singh, was of unsound mind and was under the influence of the plaintiffs and that the bond had been discharged by Chidammi (the purchaser of Randhir Singh's property) and had been returned to him. He denied the allegation of loss of the bond made on behalf of the plaintiffs. Partab Singh and Karan Singh admitted the claim. Musammat Radha denied the bond and Musammat Chironji (the mother and guardian of the minor defendants) did not enter appearance. The Court proceeded to try the suit and held that the claim was time-barred. This finding on the question of limitation was, as the lower Appellate Court has held, erroneous in view of the rulings of this Court. The learned Subordinate Judge, however, also tried the other issues framed by him. He was of opinion that the loss of the bond was not proved and that the bond had been discharged. He accordingly dismissed the suit. Upon appeal the learned District Judge, as we have said above, disagreed with the learned Subordinate Judge on the question of limitation, but he held that the loss of the bond had not been proved and accordingly affirmed the decision of the first Court.

It is contended on behalf of the appellants that the question of the loss of the bond was immaterial. It is said that it was Nahar Singh who denied the loss, but as he admitted the bond and only pleaded payment, the question of loss was only material for the purpose of determining whether the bond had been discharged and returned. We think this contention is valid. Nahar Singh, however, also stated that his father was of unsound mind and was under the influence of the plaintiffs. That was a question which the Court of

first instance ought to have tried but did not try. It was alleged that the bond had been admitted by Musammat Chironji, the mother of the minor defendants, who are the real parties interested in the portion of the mortgaged property which belonged to Randhir Singh. That question also was not tried by the Court of first instance. If she admitted the genuineness of the mortgage and the liability of the property for the mortgage debt, that would be a strong piece of evidence in favour of the plaintiff, but it would have to be proved that she made the admission. For all these reasons we think that the case has not been properly tried. We, accordingly, discharge the decrees of the Courts below and remand the case to the Court of first instance, with directions to re-admit the suit under its original number and try it *de novo* after framing proper issues. Costs here and hitherto will be costs in the cause.

Appeal decreed; Cause remanded.

A. I. R. 1915 Allahabad 268

RICHARDS, C. J., AND PIGGOTT, J.

Kunnu Mal—Defendant-Appellant

v.

Tara Chand and others—Plaintiffs-Respondents.

Second Appeal No. 1515 of 1913, decided on 27th March 1915, from the decision of the Addl. J., Aligarh, dated 21st July 1913.

Hindu Law—Alienation—Father—Mortgage of family property not binding to the extent of consideration though cash but not for necessity.

The sons and grandsons of a Hindu mortgagor mortgaging the family property are not bound under the mortgage in respect of that part of the consideration, which was paid in cash at the registration office but not required for legal necessity. [P. 269, C. 2.]

Durga Charan Banerji—for Appellant.

Lakshmi Narain—for Respondents.

Judgment.—These are two connected appeals in which substantially similar questions were litigated. The suits were

brought in one case by the sons and grandsons, and in another case by the sons only, of one Ohhittar Mal. In the suit out of which this appeal, No. 1515 of 1913, arises, the plaintiffs were the sons and grandsons. The relief sought was a declaration that certain alienations of joint family property were not binding on the plaintiffs. There was a considerable array of defendants, of whom only one, Kanna Mal has contested the matter in second appeal before this Court. We are concerned, therefore, with the findings arrived at in the Courts below regarding two mortgage-deeds in favour of Kanna Mal, one dated the 30th March 1904 and one dated the 9th of January 1906. The consideration for these bonds has been analysed by the learned Subordinate Judge who tried the suit in the first instance. He has come to the conclusion that part of the consideration for each of these bonds was due on account of antecedent debt and is binding on the sons and grandsons. In the case of each of these bonds part of the consideration was paid in cash at registration. The finding of the first Court, which has been affirmed by the lower Appellate Court, is to the effect that it has not been shown that this money was borrowed for any such legal necessity as to make the alienation binding on the sons. On these findings the plaintiffs have been given a decree that each of these bonds is binding on them only to the extent of the antecedent debt. Coming to this Court in second appeal Kanna Mal has raised various points. One of these is as to a finding of fact with regard to the question, whether a certain award and a decree passed in accordance with the same had been actually acted upon. If the decision of the Courts below on this point were wrong, it is possible that a question of limitation might arise : but we see no reason for holding that the finding to the effect that this award has been shown to have been acted upon, should be interfered with by us. Two other pleas of a technical nature have been raised, one as to the effect of the provisions of section 41 of the Transfer of Property Act, IV of 1882, on the position of the parties, and the other is as to whether the filing of these two suits does not contravene the provisions of Order II, Rule, 2, of the Code of Civil Procedure. We are content to say

that we find no force in these pleas. The latter has been more particularly dealt with by the lower Appellate Court and we agree with the view taken by the learned District Judge on the point. The substantial plea taken is that the Courts below have not considered the question, whether the money advanced at registration in respect of each of the two bonds in favour of Kanna Mal might not constitute a debt binding upon the sons, in view of their pious duty to satisfy their father's debts not tainted with immorality. We cannot find that there was any plea to this effect taken in the Courts below, and naturally no such plea having been taken there has been no inquiry as to whether the debt in question could or could not be said to be tainted with immorality. We think, however, that the point does not really arise in a suit like the present and that it was rightly passed over in the Courts below. It might arise in the event of Kanna Mal's obtaining a simple money decree on his bonds and seeking to enforce the same against the ancestral property. What the sons and grandsons are now contesting is the alienation ; that is to say, the question raised is whether the mortgage of the family property as such is binding upon these plaintiffs in respect of those sums which were advanced cash down as consideration for the two mortgages. In the present state of authority in this Court, we think this question must be answered in the negative. The appeal, therefore, fails and we dismiss it with costs, including fees on the higher scale.

The questions raised in the connected Second Appeal No. 1516 of 1913 are substantially identical, and that appeal must also fail.

Appeal dismissed.

A. I. R. 1915 Allahabad 270

KNOX, J.

Jwala Singh and others—Plaintiffs—
Appellants

v.

Abdul Razak and another—Defendants—
Respondents.

Second Appeal No. 711 of 1914, decided on 1st June 1915, from the decision of the Dist. J., Shahjahanpur, dated 4th March 1914.

Grant—Ferry—Right to ply ferry by long user can be rebutted by evidence of Crown grant—Easements Act (5 of 1882), S. 15.

The plaintiffs were the owners of *Mouza R* and the defendants of *Mouza B*. Between villages *R* and *B* flowed the river *G*. The plaintiffs alleged that they were entitled to ply boats across the river and to disembark passengers on land belonging to the defendants and prayed that the defendants be restrained from obstructing:

Held, that the use of a ferry by the *zemindars* of *Mouza B*, which had been found to be a long and continuous use, was entitled to prevail until the plaintiffs, who were starting up an opposition ferry, could show a Crown grant or could give evidence from which a Crown grant could be presumed. [P. 271, C. 1.]

Peare Lal Banerji—for Appellants.

Iqbal Ahmad—for Respondents.

Judgment.—The plaintiffs-appellants in this Court describe themselves as *zemindars* of *Mouza Rampur Jaichand*, *Mahal Awal*; the defendants, they say, are *zemindars* of *Mouza Bamhiana*. The river *Gara* flows between the two villages. They add that the boats of both parties ply between the *Mouzas* *Bamhiana* and *Rampur Jaichand* but the defendant No. 4 in collusion with defendants No. 1 to 3 has of late prevented the plaintiffs from plying their boats and has appropriated the whole income that results from the same; in law and custom the owners of both villages are entitled to ply boats in the *Gara* between *Rampur Jaichand* and *Bamhiana*. They prayed that the defendants may be restrained from obstructing, and that damage may be awarded. In defence the plea is taken

that for a very long time the ferry at *Bamhiana* and the right to ply boats has always appertained to *Mouza Bamhiana* and the income resulting from the ferry has always been entered in the revenue papers of that village as *sewai* income.

The Munsif of Tilhar, in whose Court the case was instituted, says in his judgment, "It is clear from the statement of the plaintiffs' own witness, the *patwari*, that the defendants alone have been working the ferry referred to since the last Settlement." The plaintiffs had failed to prove that they at any time since the last Settlement or before have ever worked the ferry on their own side. On the other hand, the defendants had by their evidence shown that they alone had been working the ferry for more than 20 years and had assured a right to do so by prescriptive and adverse possession. It held, however, that a monopoly to a ferry can only be acquiesced by a Crown grant. For these reasons it decided that the plaintiffs were entitled to start a rival ferry and that the defendants could not restrain them. It accordingly granted the plaintiffs a decree to this effect, that they are entitled to ply their boats on the river between the villages referred to and that the defendants be restrained from interfering with their doing so. It pronounced no decision upon the question whether the plaintiffs have a right to embark and disembark passengers on the *Bamhiana* side, holding that it did not arise in the present case. The defendants went in appeal to the District Judge of Shahjahanpur. That Court held that for more than 20 years ferry boats had been plying and the ferrymen had taken leases from the defendants, the owners of the village *Bamhiana*, and the income arising from it is entered by the *patwari* in the *khatoni* of that village; further, it held that the opposite bank of the river belongs to the defendants. The mere fact that there is a right of way across the river does not give the plaintiffs the right to disembark passengers on the defendants' land. There is no public landing place there which every one has the right to use. For these reasons it held that the plaintiffs had no right to a declaration that they were entitled to carry passengers across the river at this ferry and allowing the

appeal, it dismissed the plaintiffs' claim with costs.

which will include fees in this Court on the higher scale.

Appeal dismissed.

The plaintiffs have come to this Court and they contend, *first*, that the defendants have no monopoly to ply their boats across the river and plaintiffs have equal rights with the defendants, *next*, that the Court below having found that there was a right of way from one village to the other across the river when it was dry, it follows that the plaintiffs could ply their boats over the river when it was full. The second plea was the one that was strongly urged. The learned Vakil's argument was that as the public had the right to go down by a path or road to Rampur Jaichand side, to cross the river when it was shallow, land on the Bamhiana side and take up their journey onwards, the defendants could not claim any monopoly to carry passengers across. When asked to point out the law or custom on which the plaintiffs based their alleged right, the learned Vakil could point out neither. Several English cases were cited but I do not think that they are of much use in deciding this matter. The case, in my opinion, resolves itself into the question whether the plaintiffs have acquired any right to easement or to a right in the nature of an easement on the Bamhiana side of the river, when that involves a right to embark and disembark passengers on another's land. It is a misnomer to talk of a public road. Whatever might be the nature of the track from the river side onwards, that track is on land belonging to the *zemindars* of Bamhiana and the plaintiffs are really seeking to enforce a right in the nature of an easement, when they claim a right to embark and disembark passengers on the Bamhiana land. Following the view taken by the Calcutta High Court in *Nityahari Roy v. Dunne* (1), I am prepared to hold that the use of a ferry by the *zemindars* of Bamhiana, which has been found to be a long and continuous use, is entitled to prevail until the plaintiffs who are starting up an opposition ferry can show a Crown grant or give evidence from which a Crown grant can be presumed. The result is that the appeal is dismissed with costs,

A. I. R. 1915 Allahabad 271

FULL BENCH

RICHARDS, C. J., BANERJEE AND
TUDBALL, JJ.

Birj Kumar Lal and others—Defendants—Appellants

v.

Sheo Kumar Missir and others—Plaintiffs—Respondents.

Second Appeal No. 143 of 1914, decided on 7th May, 1915, from the decision of the Dist. J., Benares, dated 18th September, 1913.

Agra Tenancy Act (2 of 1901)—Occupancy tenant cannot defeat usufructuary mortgagee before the Act by surrender.

Where an occupancy holding was usufructuarily mortgaged for good consideration before the passing of the Agra Tenancy Act and where the mortgagor after passing of the Act relinquished the holding to defeat the mortgagee's rights.

Held, that the relinquishment was ineffectual against the mortgagee. 10 I.C. 573 Appr. of.
[P. 272, C. 1.]

Gulzari Lal—for Appellants.

A. P. Dube—for Respondents.

Judgment.—The facts connected with this appeal are extremely simple. Prior to the passing of the Agra Tenancy Act an occupancy tenant purported to mortgage the occupancy tenancy. The term of the mortgage was 59 years. In the year 1911 the occupancy tenant entered into an arrangement with the *zemindar* to relinquish his rights. The Court below has found that the mortgage was for consideration and genuine. It has found that the object of relinquishment was to defeat the mortgagee's rights. The first Court dismissed the suit on the ground that the Civil Court had no jurisdiction. Mr. Dalal, District Judge, on appeal reversed the decree of the Court of first instance and granted the plaintiff a declaration that the

(1) [1891] 18 Cal. 659.

relinquishment was ineffectual against him, and also granted an injunction restraining the *zemindar* from interfering with the plaintiff's possession. In our opinion the decision of the Court below was correct. It is fully covered by the decision of this Court in the case of *Jai Gopal Narain v. Uman Dat* (1), with which we still agree. We dismiss the appeal with costs including in this Court fees on the higher scale. The objection is disallowed with costs.

Appeal dismissed; Objection disallowed.

(1) [1911] 10 I.C. 573.

A. I. R. 1915 Allahabad 272

RICHARDS, C. J., AND BANERJI, J.

Dwarka Prasad—Defendant—Appellant

v.

Raja Ram and another—Plaintiffs—Respondents.

First Appeal No. 348 of 1913, decided on 7th April 1915, from the decision of the Sub-J., Allahabad, dated 24th April 1914.

Limitation Act (9 of 1908), S. 25—*Mortgage bond payable by instalments—Suit filed after 12 years according to Gregorian Calendar—Held suit barred—Test when time begins to run is when plaintiff is entitled to demand if no instalment is paid.*

A mortgage bond executed on the 24th of July 1892 provided that the money due under it should be paid in eight yearly instalments. Each instalment had to be paid on *Magh Sudi Puranmashi* of each year. The last payment was to be made on *Magh Sudi Puranmashi*, 1956 corresponding to 14th of February 1900 :

Held, that a suit on the bond brought on the 19th of July 1912 was barred by limitation and that Section 25 of the Limitation Act did not apply to the case. 24 Cal. 382, Referred.

The true test in a case of this kind is on what date was the plaintiff entitled to demand his money, if payment was not made of any instalment fixed in the bond. [P. 273, C. 1.]

Sundar Lal—for Appellant.

M. L. Agarwala—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs to enforce

payment of money due upon a mortgage executed on the 24th of July 1892. The question to be considered is whether the claim of the plaintiffs, which was instituted on the 19th of July 1912, is or is not time-barred. The bond provides that the amount secured by it should be paid in eight years "in this way that we shall pay interest on the whole amount aforesaid at the rate of twelve annas per cent. per mensem and also Rs. 500 out of the principal on *Puranmashi of Magh Sudi* of each year. The first instalment of interest and that of principal shall be payable on *Puranmashi of Magh Sudi* 1949 *Sambat*. Similarly the instalment of principal and interest shall be payable each year on *Puranmashi of Magh Sudi*. We the debtors shall pay without objection interest on the whole of the remaining amount and Rs. 500 out of the principal year by year." There is a further clause in the bond that in case of default in the payment of three instalments, the creditors would be entitled to realise the whole amount secured by the bond without waiting for the other instalments.

Two contentions have been raised before us. The first is that default having been made in the payment of instalments, the whole of the amount of the bond became due when default was made in the payment of the third instalment, and accordingly calculating limitation from the date of that default the claim is time barred. The second contention is that in any event the whole amount of the bond was re-payable on *Magh Sudi Puranmashi* 1956, corresponding to the 14th of February 1900, and as the suit was brought after twelve years from that date, it is equally barred by limitation.

Holding the view that we do on the second point, it is unnecessary to refer to the first point. We are of opinion that having regard to the terms of the bond the amount of it became payable at the latest on *Magh Sudi Puranmashi* of 1956, that is to say, the date on which the eighth instalment was payable. It is true that in the earlier part of the bond it is said that the debt was to be re-paid in eight years but this is qualified by the clause which follows, namely, the clause stating how the eight years were to be

calculated. The true test in a case of this kind is on what date were the plaintiffs entitled to demand their money if payment was not made of the eight instalments fixed in the bond. If default was made on *Magh Sudi Purnamashi* 1956, corresponding to the 14th of February 1900, there can be no doubt that the creditors would be entitled to demand their money on the expiry of that date, and it would be no answer to their demand for the money to say that they were bound to wait till the expiry of eight years calculated from the date of the bond according to the English Calendar. The whole question turns upon the intention of the parties and it seems to us that in this case the intention clearly was that payment of the instalments was to be made on the *Hindi* dates mentioned in the bond, and that the last payment was to be made on the date on which the eighth instalment was payable, namely, on *Magh Sudi Purnamashi* 1956, corresponding to the 14th of February 1900. In this view Section 25 of the Limitation Act has no application to a case of this kind.

The learned Counsel for the respondents relied on the case of *Latif-un-nissa v. Dhan Kunwar* (1) and the cases referred to therein.

The provisions of the bond in that case are not identical with those of the bond before us, and even in that case Mr. Justice Ameer Ali was of opinion that Section 25 of the Limitation Act did not apply. He concurred with his learned colleague as there were doubts as to what the intention of the parties was under the document in that case.

In our opinion the suit of the plaintiffs is time-barred and ought to have been dismissed. We accordingly allow the appeal, set aside the decree of the Court below and dismiss the suit with costs in both Courts.

Appeal allowed.

A. I. R. 1915 Allahabad 273

RICHARDS, C. J. AND BANERJI, J.

Ismail Khan—Applicant

v.

Emperor—Opposite Party.

Criminal Ref. No. 73 of 1915, decided on 26th February 1915, made by the S. J., Kumaon.

Post Office Act, (6 of 1898), Ss. 19, 20, 61 and 70—S. 19 does not apply to sending of cocaine and it is not offence under S. 61.

Cocaine not being an "explosive" or a dangerous, filthy, "noxious" or "deleterious substance" within the meaning of Section 19 of the *Post Office Act*, the sending of it by post is not an offence under S. 61 of the *Post Office Act*.

[P. 274, C. 1.]

C. J. A. Hoskins—for Applicant.

A. E. Ryves—for the Crown.

Judgment.—Ismail Khan has been convicted under Section 60-A of the *Excise Act* and under Section 61 read with Section 70 of the *Post Office Act*; on conviction, on the first charge he was fined Rs. 200 and on the second one Rs. 100. The learned Sessions Judge to whom Ismail Khan appealed has affirmed the convictions but referred the matter to this Court for the purpose of having the sentences considered with a view to enhancement. Notice was duly served upon Ismail Khan and he has been represented by Mr. Hoskins as Counsel. Mr. Hoskins on his behalf urges, first, that both convictions were illegal, and that in any event the punishment was sufficient. In our opinion the Court below was justified in finding that the accused had been guilty of an offence under Section 60-A of the *Excise Act* and that he was rightly convicted. So far as the conviction under Section 61 read with Section 70 of the *Post Office Act* is concerned, we think that the conviction was not justified by law. Section 70 of the *Post Office Act*, VI of 1898, provides that any person, "who abets the commission of any offence punishable under the Act or attempts to commit any offence so punishable, shall be punishable with the punishment provided for that offence." We have now to see what offence Ismail Khan is alleged to

have abetted. Section 61 is the only section referred to. That section provides that "whoever in contravention of the provisions of Section 19 or Section 20 sends or tenders or makes over in order to be sent by post any postal article or anything shall be punishable with imprisonment for a term which may extend to one year or with fine, or with both." We have now to see whether any person in contravention of the provisions of Section 19 or Section 20 sent any article by post. Section 19 is as follows:—"Except as otherwise provided by rule and subject to such conditions as may be prescribed thereby, no person shall send by post any explosive, dangerous, filthy, noxious, or deleterious substance, any sharp instrument not properly protected, or any living creature which is either noxious or likely to injure postal articles in course of transmission by post or any officer of the Post Office." Clause (2) "no person shall send by post any article or thing which is likely to injure postal articles in course of transmission by post or any officer of the Post Office." It is quite clear that the provisions of Section 20 have no bearing on the case. It seems to us that the provisions of Section 19 really deal with the sending of articles or animals by post which will be likely to injure any person occupied in the execution of the Post Office work, or which might be likely to cause injury to articles in the course of transmission through the post. It does not seem to aim at the restriction of any trade. It is very hard to say that cocaine could be considered to be an "explosive", or a dangerous, filthy, "noxious" or "deleterious substance" within the meaning of the section. No doubt the abuse of cocaine may be followed by very serious consequences but this, it seems to us, is not what the section was intended to provide against. It is said that rules have been made to prevent the sending of these articles by post. The sending of articles by post in contravention of the rules so made does not seem to be an offence under Section 61, which only deals with the sending of articles in contravention of Section 19 and Section 20. We think, therefore, that the accused was wrongly convicted of an offence under the Post Office Act. We think, however, that the sentence under Section 60-A of the Exise

Act was inadequate. We, therefore, set aside the conviction under Section 70 read with Section 61 of the Post Office Act and acquit the accused of that offence and remit the fine. We enhance the sentence under Section 60-A of the Exise Act to a sentence of three month's simple imprisonment in addition to the fine of Rs. 200. The fine of Rs. 100, if paid, will be refunded.

Order modified.

A. I. R. 1915 Allahabad²⁷⁴

CHAMIER AND PIGGOTT, JJ.

Inayat-un-Nissa — Plaintiff-Appellant

v.

Salim-un-Nissa — Defendant-Respondent.

First Appeal No. 45 of 1915, decided on 31st May 1915, from an order of the Addl. Sub-J., Aligarh, dated 19th January 1915.

Jurisdiction—Civil or Revenue Courts—Suit for declaration of title between rival claimants or alternatively for possession of occupancy holding is cognizable by Civil Court.

A suit between rival claimants to an occupancy holding, to which the landlord is no party, for a declaration of title or in the alternative for possession is cognizable by a Civil Court. 11 I.C. 268 and 27 I.C. 913, Foll. [P. 275, C. 1.]

S. M. Suleman—for Appellant.

Ibn-i-Ahmad—for Respondent.

Judgment.—The point of law raised by this second appeal is whether a suit by one person claiming to be the occupancy tenant of a certain holding against another person also claiming to be the occupancy tenant of the same holding, in which the relief sought is a declaration of the plaintiff's title or in the alternative recovery of possession, where the *zemin-dar* to whom the rent of the holding is payable is no party, is maintainable in a Civil Court. Sitting singly we have both of us been disposed to take the same view on this controverted point as did another learned Judge of this Court, on the strength of whose reported decision the lower Appellate Court has dismissed the

suit. We find, however, that so far as reported decisions of two Judges of this Court go, there is a strong consensus of opinion the other way. We may refer to the cases of *Bhup v. Ram Lal* (1) and *Kanhi Ram v. Durga Prasad* (2). We think it better that there should be uniformity of decision upon a question of this sort; and whatever our personal opinion regarding this point of law may be, we are satisfied that we should, sitting as a Bench, follow the trend of authority in this Court. We accordingly allow this appeal, set aside the decision of the lower Appellate Court and, as that Court has dismissed the suit upon a preliminary point, we return the case to the said Court with directions to restore the appeal to the file of pending appeals and dispose of it according to law. Costs of this appeal will abide the event.

Appeal allowed; Case returned.

- (1) [1911] 11 I.C. 268=33 All. 795.
(2) [1915] 27 I.C. 913=37 All. 223.

A.I. R. 1915 Allahabad 275

RICHARDS, C.J. AND BANERJI, J.

Bisheshar Das and others—Plaintiffs-Appellants

v.

Ambika Pershad—Defendant-Respondent.

Second Appeal No. 581 of 1914, decided on 1st June 1915, from a decision of the Sub-J., Allahabad, dated 21st February 1914.

(a) *Civil P.C. (V of 1908) O. 38, Rr. 5 and 10*—R. 5 confers no right by attachment.

(a) An attachment before judgment confers no right in the property on the party who obtains the order of attachment. [P. 276, C. 1.]

(b) *Civil P. C. (V of 1908), S. 73, and O. 21, Rr. 52 and 63*—Sale price of perishable property attached and sold before judgment, deposited—Plaintiff's attachment of the money cancelled—Plaintiff sued for declaration of being entitled to the deposit—Held plaintiffs entitled in spite of previous attachment by defendants—Plaintiff's suit lay.

(b) Certain property of a perishable nature was attached before judgment by the defendant and the property was sold and the proceeds deposited in Court. The plaintiffs also obtained a decree against the same party and applied for execution by attachment of the money in Court and obtained an order of payment. On the defendant taking objection, the order was cancelled. Then plaintiffs then sued for a declaration that they were entitled to the amount of their decree out of the proceeds deposited in Court.

Held, (1) that the priority of attachment gave no priority of title to the defendants who could not, therefore, object to the money being paid to the plaintiffs. [P. 276, C. 1 & 2.]

(2) that the plaintiffs were entitled to maintain the suit. [P. 276, C. 2 & P. 277, C. 2.]

Lailli Prasad Zutshi—for Appellants.

Haribans Sahai and S. N. Sen—for Respondent.

Richards, C.J.—This appeal arises out of a suit in which the plaintiffs sought a declaration that they were entitled to Rs. 627-9-6 out of a sum which had been deposited in Court. The facts are as follows. Ambika Pershad brought a suit against Mahbub and others. Before judgment he attached property which belonged to Mahbub, under the provisions of Order XXXVIII of the Code of Civil Procedure. The property being of a perishable nature, it was sold and the proceeds were lodged in Court on the 29th of March 1911. It is out of this sum that the plaintiffs seek to be paid the amount of a decree. The plaintiffs obtained their decree on the 12th of September 1911. They made an application for execution by "attachment" of the money in Court on the 10th of January 1912. The Court made an order on the 21st of February 1912, in which it is stated that the property having been attached the money should be paid to the decree-holders upon application. An application for payment was made on the 23rd of February 1912. On the 26th of February 1912, Ambika made an objection to the money being paid to the decree-holders on the ground that he had attached it before judgment. The Court on this objection refused to allow the money to be paid out to the decree-holders, who are the plaintiffs in the present case. Ambika got his decree on the 10th of April 1912. It seems to me that we have to consider, what were the rights of the decree-holders on the 23rd of February

1912, that is to say, were they entitled by law to have their decree satisfied out of the money deposited in Court? If they were, they are entitled to a decree in the present suit provided that their remedy lay by suit. Order XXXVIII, rule 5, provides for attachment before judgment. Property can only be attached before judgment upon the Court being satisfied that the defendant, with intent to obstruct or delay the execution of any decree that may be given against him, is about to dispose of the whole or any part of his property, or that he is about to remove the whole or part of his property from the local limits of the jurisdiction of the Court. It seems to me absolutely clear that as it is only to prevent one or other or both of these things that attachment before judgment is allowed, such attachment confers no right in the property on the plaintiff who obtains the order. Everything remains as before the attachment, save that it has been taken out of the power of the defendant to dispose of the property attached or remove it out of the jurisdiction. If there was the least doubt about the matter, it is set at rest by the provisions Order XXXVIII, rule 10, which is as follows:—"Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree." Supposing, therefore, that the property had not been of a perishable nature but had been simply attached before judgment, the plaintiffs would have been entitled to have attached the property, had it sold and obtained payment under their decree. Ambika would have had no right of any sort to object to the decree of the plaintiffs being discharged. Some attempt has been made to contend that the fact that the property has been turned into money altered the circumstances. I think that is a most unreasonable contention. In my opinion the money, which represented the property which had been attached before judgment, is to be treated in exactly the same way as the property would have been, with this difference only that of course there is no sale. Under these circumstances it seems to me that the plaintiffs were clearly entitled on the 23rd of February 1912 to have had their decree

satisfied out of the money deposited in Court.

It is *next* argued that the dispute between the plaintiffs and Ambika had to be decided by the Court in which the money was deposited and that no suit lay. Order XXI, Rule 52, provides that "where property which has been attached is in the custody of the Court, any question of title or priority arising between the decree-holder and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court." Order XXXVIII, Rule 8, provides that "where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money." Order XXI, Rule 63, provides "where a claim or an objection is preferred the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive." It seems to me that the effect of Order XXXVIII, Rule 8, is to incorporate the provisions of Order XXI, and amongst them the provisions of Rule 63. The Court accordingly having investigated the claim of the decree-holders, the plaintiffs in the present suit, and made an order against them, the effect of which was that they were not allowed to receive payment of their decree, they are entitled to institute a suit. I hold, therefore, that the present suit is maintainable. I would allow the appeal and decree the plaintiffs' claim.

Banerji, J.—I have arrived at the same conclusion. The *first* question to be determined is, whether the Court below was justified in ordering a rateable distribution. It is clear from the provisions of the Code of Civil Procedure that priority of attachment gives no priority of title. Order XXXVIII, Rule 10, clearly provides that where property has been attached before judgment, that circumstance does not preclude any other judgment-creditor of the judgment-debtor from attaching the same property and proceeding to the sale of it. It is obvious from the provisions of that rule that notwithstanding an attach-

ment before judgment, any other creditor, who has obtained a decree, may proceed to execution and cause the property attached to be sold. The effect of the attachment before judgment is only to prevent the debtor from dealing with the property, but the property still continues to be his. Therefore, the plaintiffs in the present case were entitled to attach the money which was in Court, being the proceeds of the sale of the property attached before judgment. As the Court made an order on the 23rd of February 1912, directing the money attached to be paid over to the plaintiffs, the plaintiffs were entitled to receive that money and the Court or the defendant Ambika Prasad could not deprive them of their right to get the money. Had Ambika Prasad already obtained a decree on the date on which the money was ordered to be paid to the plaintiffs and had he applied for execution, different equities might arise. It may be that when several decree-holders have caused the same property to be attached, but to whose case Section 73 of the Code of Civil Procedure does not strictly apply, they would be entitled to a rateable distribution on general principles of justice, equity and good conscience. But that is not the case here. It is not necessary, therefore, to express any opinion on the point. In the present case, as I have said above, Ambika Prasad had not obtained his decree when the Court ordered the money in deposit, attached by the plaintiffs, to be paid over to them. Had the property not been of a perishable nature, and had it not been already sold, the plaintiffs would have been entitled to get it sold, and after the sale to have their decree satisfied out of the proceeds of the sale, and there is nothing in the Code to prevent their doing so merely because Ambika Prasad had caused the same property to be attached before judgment. He had not obtained a decree and had not applied for execution. Section 73 of the Code of Civil Procedure would not apply to a case of this kind, because this was not a case in which several decree-holders had before the realisation of assets applied for execution of their decrees.

There remains the other question as to whether such a suit is maintainable. As has been pointed out by the learned Chief Justice Rule 52 and the subsequent rules in Order XXI are, by reason of the provi-

sions of Order XXXVIII, Rule 8, applicable to cases of attachment before judgment. Under Rule 52 of Order XXI the Court which holds the property is the Court which must decide all claims made in respect of it, whether arising from assignment or attachment or otherwise. The mode of investigation is provided for by Rule 58 and the subsequent rules, but in all cases when an order is made, the defeated party is entitled to bring a suit to establish his right under Rule 63. The language of that rule differs from that of Section 283 of the old Code of Civil Procedure. Under that section a party was allowed to bring a suit when an order had been passed against him under Sections 280, 281 and 282. There is no such limitation in Order LXIII and this alteration appears to have been deliberately made by the Legislature to include all cases of orders of this kind passed under Order XXI, including orders under Rule 52. I find that under the old Code of Civil Procedure, it was held that where an order was made under Section 272, which corresponds to the present Rule 52 a suit would lie to set aside the order [*Tikum Singh v. Sheo Ram Singh* (1)]. The present suit was, in my opinion, clearly maintainable. I also would allow the appeal.

By the Court.—The order of the Court is that the appeal be allowed, the decree of the Court below set aside and the decree of the Court of first instance restored with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

(1) [1892] 19 Cal. 286.

A. I. R. 1915 Allahabad 277

CHAMIER AND PIGGOTT, JJ.

(Muhammad) Inam-ullah Khan—
Judgment-debtor—Appellant

v.

Narain Das — Decree-holder — Respondent.

First Appeal No. 185 of 1914, decided on 21st April 1914, from an order of the Sub-J., Agra.

Civil P. C. (V of 1908), O. 38, R. 5, and O. 39, R. 1—Suit on mortgage of right to collect malikana dues—Order restraining receipt of dues in execution of the decree is ultra vires.

The appellant mortgaged to the respondent his right to receive *malikana* dues from a number of villages and a decree for sale was passed on the mortgage. But before the sale the decree-holder obtained an order restraining the judgment-debtor from receiving the *malikana* dues.

Held, that the Court had no power either to attach the *malikana* dues or to prevent the appellant from receiving them.

[P. 278, C. 1.]

Abdul Raoof—for Appellant.

Shiam Krishna Dar—for Respondent.

Judgment.—This appeal arises out of an order passed in the course of proceedings taken to execute a decree dated November 23rd, 1911. It appears that in August 1901, the appellant mortgaged to the respondent his right to receive what are described as *talukdari malikana* dues from a number of villages. A decree *nisi* for sale of the property was passed in favour of the respondent on November 23rd, 1911. There was an appeal to this Court which was dismissed in April 1913, and an order absolute for sale of the property was passed on February 10th, 1914. In March of the same year the respondent applied for sale of the property. Notice was issued to the appellant who put forward objections. Those objections were ultimately dismissed and an order was made that the property should be sold. On July 10th, 1914, the respondent applied to the Court to issue an injunction to the appellant restraining him from receiving the *malikana* dues. At first sight it seems to be an application under Order XXXIX, Rule 1 of the Code of Civil Procedure, but from certain expressions used in the application it may have been an application under Order XXXVIII, Rule 5 of the Code of Civil Procedure. The Court *ex parte* made an order as prayed and issued injunction. Objections were put forward which were dismissed and the *ex parte* order of the Court was maintained. This is an appeal against the last-mentioned order.

As the appellant has a right of appeal whether it was an order of attachment or an order for the issue of injunction, it is unnecessary to consider whether it was passed under Order XXXVIII, or under Order XXXIX, of the Code of Civil Procedure. In appeal it is contended that the Court had no power either to attach the *malikana* dues or to prevent the appellant by injunction from receiving them. It is contended that all that the respondent is entitled to do, under his decree, is to have the property sold. For the respondent it is contended that it is competent to a Court to attach property in a case of this kind, at all events where it is clear that, in the event of the mortgaged property not realizing sufficient to satisfy the decree, a decree can be passed under Order XXXIV, Rule 6. We will assume, for the purposes of this appeal, that the property mortgaged will not realize sufficient to satisfy the decree. It appears to us clear that the case does not fall either within Order XXXVIII, Rule 5 or within Order XXXIX, Rule 1 of the Code of Civil Procedure. There is no suggestion that the appellant is about to dispose of the whole or any part of his property, or remove it from the jurisdiction of the Court, or that any property in dispute is in danger of being wasted, or that the appellant intends to remove his property with a view of defrauding his creditors. All that the appellant in the present case insists upon doing is receiving the income of the property until a sale takes place. In the last resort it is contended that the Court was justified in passing the order under appeal either under clause (c) or clause (e) of Section 94 of the Code of Civil Procedure. It is a question whether the clauses referred to are intended to authorise a Court to grant injunctions or to make attachments in cases not provided for by the Orders or rules. We may assume that it was intended to give the Court powers outside the Orders and rules in exceptional cases. In the present case, we see no reason to take action of an extraordinary character. The order absolute for sale was not passed until February 1914, and it cannot be said that the appellant has for any great length of time prevented the respondent-decree-holder from enforcing his decree.

Assuming, therefore, that Section 94 can be construed in the way suggested by the respondent, we are not prepared to hold that the present case is covered by that section. It seems to us that the Court below was not justified in either attaching the *malikana* dues or restraining the appellant by injunction from receiving them. We allow the appeal and set aside the order of the Court below. The respondent will pay the appellant's costs of this appeal. The record should be sent back at once so that further execution may not be delayed.

• *Appeal allowed.*

A. I. R. 1915 Allahabad 279

CHAMIER AND PIGGOTT, JJ.

Allahabad Trading and Banking Corporation Ltd—Petitioner-Applicant

v.

*Ghulam Muhammad and others—
Opposite Parties-Respondents.*

First Appeal No. 49 of 1914, decided on 6th April 1915, from an order of the Dist., J., Allahabad, dated 11th March 1914.

Provincial Insolvency Act (I of 1907), S. 31—Creditor made sole agent for sale of debtor's books with condition that sale proceeds are to be credited towards debt—Creditor is a secured creditor.

Where an agreement was entered into between a debtor and his creditor whereby the latter was appointed the sole agent for the sale of all books already published or thereafter to be published by the debtor with a condition that the sale-proceeds, after deducting the commission, was to be credited towards the discharge of the debt:

Held, that the creditor was entitled to be regarded as a secured creditor.

[P. 279, C. 2 & P. 280, C. 2.]

Secured creditor means a person holding a mortgage, charge, or lien upon property of the debtor or any part thereof as security for the debt due to him from the debtor. [P. 280, C. 2.]

Satish Chandra Banerjee and Sarat Chandra Chaudhuri—for Appellant.

Harendra Krishna Mukerji, S. J. Shopoorjee, Girdhari Lal Agarwala, Ladli Prasad Zutshi and Uma Shankar Bajpai—for Respondents.

Judgment.—The only question for decision in this appeal is whether the appellant, the Allahabad Trading and Banking Corporation, Limited, is entitled to be regarded as a secured creditor of the respondent, Ghulam Muhammad, who has been declared an insolvent. The appellant Bank rests its claim to be regarded as a secured creditor (1) upon an agreement, dated October the 18th 1910, (2) upon Section 171 of the Indian Contract Act, and (3) upon Section 221 of the same Act. The learned District Judge has held that all three grounds are untenable. As regards the *second* and *third* grounds we may content ourselves with saying that we agree with the Court below that neither Section 171 nor Section 221 of the Contract Act gives the appellant any lien on the property in question. The *first* ground requires careful examination. The agreement above mentioned was entered into between Ghulam Muhammad and his wife, *Musammat* Shahzadi, on the one hand and the appellant Bank on the other. It begins by appointing the Bank sole agent for the sale of all books already published or to be published thereafter by the City Press and Messrs. G. A. Asghar and Co. It appears that Ghulam Muhammad and his wife were owners of the City Press and carried on business also under the name of Messrs. G. A. Asghar & Co. The appointment of the Bank as the sole agent of Ghulam Muhammad and his wife for the sale of the books is declared to be subject to several terms or conditions. The first condition is, shortly, that all books then in stock and all books to be published thereafter are to be made over at once to the appellant Bank and the liability of the Bank in respect of the books made over to them is specified. The second condition is that a commission of eight per cent. will be allowed to the Bank on the net value of all books sold by it, except school and college books on which a commission of ten per cent. will be allowed. The third condition is that the sale proceeds of the books realized by the Bank shall be placed to the credit of Ghulam Muhammad's and *Musammat*

Shahzadi's joint loan account every month after deducting the commission due to the Bank. The fourth clause deals with discounts. The fifth with the giving of credit to purchasers. The sixth with the question of advertising books for sale. The seventh clause provides that the agreement shall continue as long as Ghulam Muhammad and Musammât Shahzadi remain owners of the City Press and the firm of Messrs. G. A. Asghar & Co., and as long as the appellant Bank continues. The eighth condition (so called) is an undertaking by one Ram Charan Shukul, on behalf of the appellant Bank, to act as the sole agent of the City Press and of Asghar & Co., on the terms and conditions set out in the agreement. The appellant Bank relies principally upon the third clause of the agreement, namely, that which provides that the sale proceeds shall be credited to the joint loan account of Ghulam Muhammad and Musammât Shahzadi. On behalf of the general body of creditors, it is contended that the agreement of October the 18th, 1910 evidences no more than a contract of agency, and it is argued that the parties cannot have intended to make the books security for any particular loan, seeing that it is expressly provided that the agreement is to last so long as the two businesses owned by Ghulam Muhammad and his wife exist, and so long as the appellant Bank continues to do business; it is said that if the intention had been to make the books security for the benefit of the appellant Bank, some express provisions would have been made regarding proceeds of sale after the loan was paid off. Stress is also laid on the fact that the agreement does not in express terms confer either a lien or a charge on the Bank.

The learned District Judge says that the claim of the Bank based upon the agreement of October the 18th, 1910, is obviously untenable, for the agreement does not provide that books shall be regarded as security for the debt or that the creditors shall have a lien on them, and that the third clause, on which the Bank relies so much, prescribes merely the way in which the sale proceeds shall be applied. On behalf of the Bank it is contended that the agreement should be construed as a whole, and that the test is whether the parties to the agreement

intended that the Bank should, under it, have special facilities for recovering the advances which it had made. The expression "secured creditor" is not defined in the Provincial Insolvency Act. For the purposes of this case both sides are content to accept the definition contained in the English Bankruptcy Act, according to which *secured creditor* means a person holding a mortgage, charge, or lien upon the property of any debtor or any part thereof as security for the debt due to him from the debtor. The word security is not defined in the Indian Act or in the English Act. On behalf of the Bank it is contended that the word means and includes anything that makes payment of the money more secure or the money more readily recoverable. There can be no doubt that the agreement was intended to give the appellant Bank the exclusive right to sell all the books published by the debtor and his wife and to appropriate the whole of the proceeds, after payment of the commission, towards the discharge of the joint loan account. According to the agreement the Bank had a right not only to retain, when handed over the books of the debtor and his wife and sell them, as provided in the agreement, but a right to call upon the debtor and his wife to deliver all books, as they were published, for the purpose of being sold by the Bank. It seems to be impossible to avoid the conclusion that the intention was to confer a security upon the Bank. A question might arise as to whether the general body of creditors would not be entitled to any surplus proceeds available after discharge of the Bank's claim. We are informed, however, that there is no prospect of there being any balance after the discharge of the Bank's claim and that we need not consider the question any further. We hold that the agreement was intended to give the appellant Bank a lien or charge on the books and that, therefore, the Bank is entitled to be regarded as a secured creditor. We allow this appeal and set aside the order of the District Judge. Costs of this appeal and of the proceedings in the Court below will be paid out of the estate. In the circumstances this means that the appellant Bank will be entitled to add its costs to the amount due to it under the agreement.

Appeal allowed.

A. I. R. 1915 Allahabad 281

RICHARDS, C. J. AND PIGGOTT, J.

Rasul Khan and others—Appellants

v.

Emperor—Respondent.

Criminal Appeal No. 60 of 1915, decided on 26th March, 1915, from an order of the S. J., Aligarh.

Penal Code (XLV of 1860), Ss. 149 and 302—Death happening in lathi charge with object of rescuing cattle—All guilty under S. 302.

In an attempt to rescue certain cattle from being driven to the pound one of the persons of the accused party ordered the others to use their *lathis* and beat the other party. The *lathis* were at once used with the result that one of the opponents died:

Held, that the offence was committed in furtherance of the common object of the party and each one of the accused was guilty of an offence under S. 302 of the Penal Code.

[P. 281, C 2].

C. Dillon and Muhammad Hameed Ullah—for Appellants.

R. Malcomson—for the Crown.

Judgment :—This is an appeal by nine persons against convictions under S. 302 read with S. 149 of the Indian Penal Code and sentences of transportation for life. The main facts of the case are proved beyond all possible doubt. The cattle of the accused's party were trespassing and apparently doing considerable damage to the crop growing in a field belonging to the complainants. The complainants' party drove off the cattle and were bringing them to the pound. Some twelve or thirteen persons rushed down armed with *lathis* to rescue the cattle. Ranne Khan, appellant, at once gave the command to rescue the cattle and to use their *lathis*. The appellants' party at once proceeded to carry out the order. One of the complainants' party, a man named Lekha, ran away for about ten paces pursued by three men, all of whom are amongst the appellants, namely, Rasul Khan, Hakim Ali and Ashraf. They surrounded him, cutting off his retreat. All the witnesses agree that Rasul struck him with a *lathi* on the top of the head. The witnesses also agree that he was struck by Ashraf and Hakim Ali. There is some discrepancy as to which of these two last-mentioned persons actually struck him on the head, but he was struck again on the head with a *lathi*. He was struck with *lathis* even after he fell to the ground. The attack was unprovoked, save about the cattle, and the

complainants' party were unarmed. The medical evidence shows that Lekha received two fractures of the skull, on the right and left temple. He also had a contusion over the left side of the chest and over the left eye. Death resulted almost immediately. Another of the complainants' party, named Chuta, received injuries, which caused compound fractures of both bones of the right arm and a simple fracture of the left arm. Another man, Puran, suffered compound fracture of the right ulna.

We have first to consider what was the offence which caused the death of Lekha. These blows on the head with *lathis* were undoubtedly sufficient in the ordinary course of nature to cause death. They were intentionally struck and death resulted. The appellants' party seem to have acted with considerable ferocity and cruelty. In our opinion the evidence amply justifies the finding that an offence under S. 302 was committed.

We have next to consider whether or not this offence was committed in "pursuance" of the common object of the appellants' party. All the members of this party came down armed with *lathis*, and the man who seems to have been the most influential amongst them, namely, Ranne, ordered them to use their *lathis*, and the *lathis* were at once used with the result which we have stated before. Taking the evidence as a whole, we think that it is impossible to say that the offence, which was in fact committed, was not committed in "prosecution of the common object." Section 149 provides "that where an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, every person, who at the time of the committing of that offence is a member of the same assembly, is guilty of that offence." Some attempt was made to show that the killing of Lekha was a separate transaction. We think that this contention cannot be sustained on the evidence, and that all the appellants were members of an unlawful assembly at the time that Lekha met his death. On these findings the appeals must necessarily be dismissed. We have no power to award any less punishment than the punishment of transportation for life. We, however, think it right to say that in our opinion the most guilty of the appellants were Ranne Khan, Rasul Khan, Ashraf and Hakim Ali. There is no evidence to show that Ranne struck any blow himself, but he was undoubtedly more

responsible than any one else. It is said that he is a very old man, perhaps this was the very reason why his advice was followed. It is difficult to draw any distinction between Rasul, Ashraf and Hakim Ali. They were all beating the unfortunate Lekha at the same time. Rasul beyond doubt struck him one of the blows on the head which caused the fracture to his skull. If it were within our power to do so, we would award substantially less punishment to the other appellants. We dismiss the appeals.

Appeal dismissed.

A. I. R. 1915 Allahabad 282.

RICHARDS, C. J. AND BANERJI, J.

Mt. Sundar Kunwar—Plaintiff-Appellant

v.

Dina Nath and others—Defendants-Respondents.

First Appeal No. 318 of 1913, decided on 18th February, 1915, from the decision of Sub-J., Moradabad, dated 2nd May, 1913.

U. P. Land Revenue Act (III of 1901), Ss 111 and 112—Revenue Court's decision of proprietary right if not appealed from, bars subsequent civil suit—Civil P. C. (V of 1908), S. 11.

Where in an ejectment suit in a Revenue Court the defendants raise a plea of proprietary title and the Revenue Court decides the question itself and the plaintiff fails to appeal to the District Judge, the decision of the Revenue Court becomes final and bars any subsequent suit in the Civil Court *Case-law Ref.*

[P. 292, C. 2]

B. E. O'Connor and Surendra Nath Sen—for Appellant.

Mohan Lal Sandal—for Respondents.

Facts:—The plaintiff, Sundar Kunwar, instituted a suit in the Revenue Court. The defendants pleaded that they were not her tenants and that the plaintiff had given them the property. The Assistant Collector decided in favour of the defendants. The plaintiff appealed to the Commissioner who affirmed the decree of the Collector. The plaintiff again brought a suit in the Revenue Court, which dismissed the suit. The plaintiff then brought the present suit in the Civil Court. The Subordinate Judge dismissed the suit, the plaintiff appealed to the High Court.

Judgment:—This appeal arises out of a suit for ejectment. A suit was instituted

by the plaintiff in the Revenue Court in the year 1909 or 1910, in which the plaintiff alleged that the defendants were her tenants and she sought to eject them for non-payment of rent. In that case the defendants pleaded that the plaintiff had given them the property. The Assistant Collector held that the story told by the defendants was correct, namely, that the plaintiff having no issue of her own brought them from their village and established them on the property, promising that they should have the property now in suit. Having found that these were the true facts he concludes by saying, "under these circumstances I find the defendants are rent-free holders of the land in suit, which was given to them in gift by the plaintiff." The plaintiff appealed to the Commissioner (not to the District Judge). The Commissioner held in effect exactly the same as the Assistant Collector had held. Meanwhile a second suit had been brought by the plaintiff for rent, also in the Revenue Court. This suit has been dismissed as being a matter which was already decided in the suit to which we have already referred. The plaintiff then instituted the present suit in the Civil Court. The Court below has dismissed her suit on the ground that the previous proceedings bar the suit.

It seems to us that the decision of the Court below was correct. The plea of the defendants in the first mentioned suit was clearly a plea that they were the proprietors. Two courses were open to the Revenue Court. It could decide the question itself, in which case the appeal lay to the District Judge, or it might refer the parties to the Civil Court. From the nature of the issue framed and the finding of the Court it seems to us that we must presume that the Revenue Court adopted the first course. It was, therefore, the plaintiff's duty to have appealed to the District Judge if she was dissatisfied with the decision. She did not do so and, therefore, the decision of the Revenue Court is final and has the same effect as the decision of the Civil Court. [See *Shazade Singh v. Mohammad Mehdi Ali Khan* (1), *Bed Saran Kuar v. Bhagat Doo* (2), *Beni Pande v. Raja Kausal Kishore Prasad Mal Bahadur* (3).]

(1) (1903) 3 I. C. 954=32 All. 8.

(2) (1911) 10 I. C. 924=33 All. 453 (F.B.).

(3) (1907) 29 All. 160=4 A. L. J. 53=1907 A. W. N. 6.

If we were to hold that the decision by the Assistant Collector and the Commissioner was that the defendants were rent-free grantees, then the plaintiff's remedy would be under the Tenancy Act to have the rent-free grant resumed.

We dismiss the appeal with costs including in this Court, fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 283.

CHAMIER, J.

Bhajan Tewari—Petitioner

v.

Emperor—Opposite Party.

Criminal Revn. No. 117 of 1915, decided on 13th March, 1915, from an order of the Asst. Collector, Basti.

Penal Code (XLV of 1860), S. 182—Assistant Collector not competent to receive application under rules framed under S. 70, Civil Procedure Code, cannot order prosecution under S. 182.

An Assistant Collector has no powers of either Civil, Revenue or Criminal Court while receiving an application under R. 30 of the rules framed by the Local Government under Ss. 68 and 70 of the Code of Civil Procedure, 1908. Hence if an offence as defined in S. 182 of the Penal Code is committed in the course of making the application under the above rule, the Assistant Collector has no jurisdiction to order prosecution. [P. 284, C. 2.]

R. K. Sorabji—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Judgment :—This is an application for revision of an order passed by an Assistant Collector of the first Class in the Basti District directing the prosecution of the applicant for an offence under S. 182, Indian Penal Code. A question might arise as to whether this application should not have been presented under S. 115 of the Code of Civil Procedure and not under Chap. XXXII of the Code of Criminal Procedure. But in the view I take of the case, it is unnecessary to discuss the question.

It appears that one Bindhachal Tewari obtained a decree for money against Bhajan Tewari and others in the Court of the Munsif of Basti. In execution of that decree immovable property was ordered to be sold and the execution of decree was transferred under S. 68 of the Code of Civil Procedure to the Collector of Basti. On October 23rd, 1914, a sale took place and the property was knocked down to one Ramphal Misra. On November 3rd,

1914, the judgment-debtor presented a petition under R. 30* of the rules made by the Local Government under Ss. 68 and 70 of the Code of Civil Procedure praying for permission to pay the sum decreed and five per cent. of the purchase money. Next day he presented a petition in which he said he had paid in the sum required by R. 30, and he prayed that the sale might be set aside. On November 5th he put in a petition, saying that some unauthorized person had paid the money into the treasury and he charged Banshi and others with having compelled him to put his thumb impression on a blank paper

* Rule 30. (1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing with the Collector.—

(a) for payment to the purchaser, a sum equal to 5 per cent. of the purchase money; and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder

(2) where a person applies under R. 31 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Rule 31. Where any immovable property has been sold in execution of a decree, the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Collector to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Collector is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Rule 32. (1) Where no application is made under R. 30 or R. 31 or where such application is made and disallowed, the Collector shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where in the case of an application under R. 30 the deposit required by that rule is made within 30 days from the date of sale, the Collector shall make an order setting aside the sale:

Provided that no order shall be made unless notice of this application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

which was subsequently used for the petition under R. 30. It is quite clear that the Assistant Collector to whom these applications were presented was a public servant, and I will assume that a charge might properly be brought against Bhajan Tewari under S. 182, Indian Penal Code, in respect of the statements made by him in his third petition. On behalf of Bhajan it is, however, contended that the Assistant Collector who ordered his prosecution had no power to do so not being a Civil, Criminal or Revenue Court. The Assistant Collector has the powers of a Magistrate of the First Class, but the application was not made to him as a Magistrate, it is clear that it was not made to him as a Revenue Court, and it is beyond question that even if the officer in question could be regarded as a Criminal or Revenue Court, the alleged offence was not committed before him or brought under his notice in the course of any judicial proceeding of a Criminal or Revenue Court. The question is whether the Assistant Collector was, or had the powers of, a Civil Court in respect of the application made by Bhajan Tewari. The rules made by the local Government above referred to contain provisions authorizing a Collector to make over to any Assistant Collector of the First Class any of the powers and duties conferred by the rules upon the Collector with certain exceptions. It seems that in respect of powers and duties delegated by the Collector to an Assistant Collector of the First class the latter may be a Civil Court, for S. 70 of the Code of Civil Procedure authorizes the Local Government to make rules conferring upon a Collector or any gazetted subordinate of the Collector all or any of the powers which the Court, that is, the Civil Court, might have exercised in the execution of the decree if the execution had not been transferred to the Collector. Among the powers of a Collector which may not be delegated to an Assistant Collector under the rules are the power to order a sale under paragraph (1) (c) and certain other paragraphs of the third Schedule to the Code of Civil Procedure and the power to confirm a sale or set aside a sale under R. 32 of the rules made by the Local Government. It thus appears that the Assistant Collector who has ordered the prosecution of the applicant had no power either to sell the property as a Court or to confirm the sale or to set it

aside. The application in respect of which the prosecution has been ordered was presented to the Assistant Collector. Possibly no objection could be taken to this; but the Assistant Collector could not deal with the application. He could only pass it on to the Collector who would then dispose of it with the powers of a Civil Court. It appears to me that so far as the application in question was concerned, the Assistant Collector had no powers of a Civil Court and the application was not presented to him in the course of a judicial proceeding. That being so, I must hold that the Assistant Collector had no power to order the prosecution of the applicant. I, therefore, set aside his order.

Order set aside.

A. I. R. 1915 Allahabad 284.

CHAMLER AND PIGGOTT, JJ.

Thakur Mordhaj Singh—Judgment-debtor-Appellant

v.

Jahangiri Mal and others—Decree-holders-Respondents.

First Appeal No. 265 of 1914, decided on 17th February, 1915, from the First Addl. J., Aligarh, dated 16th May, 1914.

Civil P. C. (V of 1908), O. 41, R. 33—Appellate Court can correct decrees in favour of non-appealing respondents.

An Appellate Court has power to set the decree of the Court below right even in respect of that portion of it which is against the respondent and in respect of which the respondent has not appealed. [P. 285, C. 2]

Reves—for Appellant.

Bajpal—for Respondents.

Judgment :—This appeal arises out of proceedings taken to execute a decree for sale passed in a suit upon two mortgages dated June, 18th 1888 and August, 10th 1894. The earlier mortgage comprised 5 *biswas* of a village called Partauli and 5 *biswansis* of a village called Nausana. The later mortgage was of a 2 *biswas*-share in Partauli and a 5 *biswansis*-share in Nausana. In the suit on the mortgages it was held that the same 5 *biswansis*-share in Nausana was covered by both mortgages, but that of the 2 *biswas* share in Partauli covered by the second mortgage, only 1 *biswa* 12 *biswansis* 16 *kachwansis* were included in the 5 *biswas* share mortgaged by the first deed, and the remaining 7 *biswansis* 4 *kachwansis* were outside the 5 *biswas*-share. The Court passed a pecu-

liar decree, which provided that the shares included in the first mortgage should be sold separately for the recovery of Rs. 1,876-4-0 declared to be due on that mortgage and that if there was a balance after discharging that amount then the whole of so much of the balance as was attributable to Nausana and part of the balance attributable to Partauli (*i.e.*, a part bearing the same proportion to the whole as 1 *biswa* 12 *biswansis* 16 *kachwansis* bear to 5 *biswas*) should be devoted towards the discharge of the second mortgage. In passing we may observe that the decree does not indicate how the balance, if any, was to be divided between the two villages, but we assume that the intention was that the balance should be divided between the two shares in proportion to the sums realised by the sale thereof. The decree went on to provide that the 7 *biswansis* 4 *kachwansis*-share in Partauli should be sold and the proceeds along with the balance aforesaid should be devoted to the discharge of the second mortgage. In July 1913 the judgment-debtors paid Rs. 2,085 into Court, that being the amount then due on the first mortgage, and claimed that it should be received by the decree-holders on account of that mortgage alone, and that that mortgage should be declared to have been discharged. The decree-holders objected and the Court held with them that the payment must be taken to have been made on account of the whole decree. The judgment-debtors appealed to this Court but their appeal was dismissed. In February 1914 the decree-holders made the application for execution out of which this appeal has arisen, praying that the property might be sold in accordance with the directions contained in the decree. The judgment-debtors objected that the first mortgage had been discharged by the payment of 1913 and that the decree-holders were entitled only to bring to sale the 7 *biswansis* 4 *kachwansis*-share in Partauli: The Court below has held that the decree-holders are entitled to bring to sale a 2 *biswas*-share in Partauli and a 5 *biswansis*-share in Nausana for recovery of the balance due under the decree, that is to say, the amount due under the second mortgage. We cannot follow the Subordinate Judge in his construction of the decree. In our opinion the judgment-debtors cannot go behind the previous decision that the payment made by them was made on

account of the decree as a whole. We hold that the decree-holders are entitled to execute the decree in accordance with its terms, *i.e.*, they are entitled to bring to sale the 5 *biswas*-share in Partauli and the 5 *biswansis* share in Nausana. Out of the proceeds the first mortgage should be discharged and the balance, if any, should be dealt with as directed by the decree, *i.e.*, 41/125ths of the balance attributable to the share in Partauli and the whole balance attributable to the share in Nausana should be devoted to the discharge of the second mortgage, and then if necessary the 7 *biswansis* 4 *kachwansis* share in Partauli should be sold. The amount paid in by the judgment-debtors should be treated as part satisfaction of the decree as a whole and dealt with in the usual way. The only question is whether we can make an order to this effect now, seeing that the Court below has made an order giving the decree-holders less than they are entitled to and the decree-holders have not appealed against it. Order XLI, R. 33, empowers us to pass such an order if we think fit to do so. On a full consideration of all the circumstances, we have come to the conclusion that we ought to take advantage of this rule. The order of the Court below is clearly wrong, but it would be most inequitable to merely set it aside as suggested by the judgment-debtors with the probable result of putting an end to further execution of the decree. In 1913 the judgment-debtors sought to take advantage of the peculiar nature of the decree and prevent the decree-holders from enforcing their security. That attempt was frustrated by the Court. Their present objection is another dishonest attempt to deprive the decree-holders of the fruits of their decree. We, therefore, allow this appeal and set aside the order of the Court below, but we direct that the decree be executed in the manner laid down in the decree, that is to say, that the 5 *biswas*-share in Partauli and the 5 *biswansis*-share in Nausana be sold and the proceeds be devoted to discharging the first mortgage, that the balance be dealt with as provided by the decree, and that the 7 *biswansis* 4 *kachwansis* share in Partauli be sold and the proceeds together with the balance aforesaid be devoted to discharging the second mortgage, and that the sum paid into Court by the judgment-debtors be credited towards the decree as

a whole. The parties will pay their own costs in this Court. The judgment-debtors will pay the decree-holders costs in the Court below.

Appeal allowed.

A. I. R. 1915 Allahabad 286.

TUDBALL AND RAFIQUE, JJ.

Baldeo Thakurai and others—Defendants-Appellants

v.

Ugra Nath Misra and others—Plaintiffs-Respondents.

First Appeal No. 20 of 1913, decided on 30th April, 1915, from the decision of the Additional District Judge, Gorakhpur, dated 11th October, 1912.

(a) *Regulation (XI of 1825), S. 4—Burden of proof that accretion is according to law is on person claiming it—Alluvion and Diluvion.*

Where the question is of the manner in which land has been cut away from one village and thrown up on the other side of the river, the burden of proof is on the party who claims the accretion to show that the accretion to his tenure has been of the nature contemplated by the law as laid down in Regulation XI of 1825 and unless he can prove this satisfactorily, he cannot be said to have proved his title.

[P. 288, Cs. 1 & 2.]

(b) *Regulation (XI of 1825), S. 4—In small village accretion of some bighas is not by show or imperceptible means.*

Where the villages are small in area and their common boundary but short in length and where there is a small river, shallow and fordable, which at one season of the year is liable to sudden floods cutting away a portion from the small estates :

Held : that under the circumstances the accretions of a few bighas per annum can hardly be said to be by gradual, slow and imperceptible means as contemplated by the Regulation.

[P. 288, C. 2 & P. 289, C. 1.]

(c) *Adverse possession—Submerged land is deemed to be in possession of owner during flood—No adverse possession can be claimed.*

A person cannot be said to have acquired a title by prescription to a land which remains covered with the flood water of a river for a certain period every year, as he must be deemed to have been dispossessed by *vis major* during the time of flood and as under law the possession during flood time is in the person who has title.

[P. 289, C. 1.]

Sunder Lal—for Appellants.

Tej Bahadur Sapru—for Respondents.

Judgment :—The circumstances out of which this present appeal has arisen are as follows :—

The village of Purnian, which belongs to the plaintiffs-respondents, and the village

of Chatrapar, which belongs to the defendants-appellants, are situated in the northern part of the Basti District. What is known as the Bilar Nadi flowed between them and at the last Settlement formed the boundary.

A reference to the Settlement Report and the maps attached thereto shows that what is called the Bilar river is really a bed of the Burhi Rapti, which falls into the larger Rapti river.

The Banganga, a hill torrent, flows into the Burhi Rapti and it apparently forced the latter river into another and more direct channel towards the Rapti. From the junction of the Banganga the old course of the Burhi Rapti is called the Bilar Nadi. At the time of the last Settlement, however, it was noted that Burhi Rapti after its junction with the Banganga was sending a greater part of its volume of water down the Bilar Nadi. The result of this has been that in places the Bilar has been cutting away its banks and altering its course.

This admittedly has happened in that portion of its course which lies between the two villages in the present case.

The plaintiffs have filed a map, which fairly accurately shows the position as regards these two villages which the river occupied at the time of Settlement and on the date of suit. One point will be noticed, that is that at Settlement time the boundary between the two villages was the mid-stream and that it was but a short one.

The plaintiffs' case is as follows :—

(1) that by custom the boundary between the two villages has always been the mid-stream line of the river, any land cut away from either village by a change in the course, going to the owner of the other village ;

(2) that the river has been gradually encroaching on the lands of Chatrapar and adding land to Purnian ;

(3) that out of a total area of 43 bighas 9 biswas and 15 dhurs thus added to their village, an area of 26 bighas 2 biswas and 6 dhurs of land were added up to 1304 Fasli and 17 bighas 7 biswas 9 dhurs have been added since 1304 Fasli ;

(4) that the land in question has been in the proprietary and adverse possession of the plaintiffs as of right ;

(5) that the Revenue Authorities have surveyed the land and have held that a

part of it is in possession of the defendants and have passed an order adverse to the plaintiffs;

(6) that the plaintiffs being still in possession are entitled to a declaration of their title as proprietors, and if they be found not to be in possession, possession may be awarded to them.

The defendants pleaded :

(1) that they, and not the plaintiffs, were in possession;

(2) that the lands in question had been suddenly cut away in the year 1314 *Fasli*,

(3) that there was no such custom, as alleged by the plaintiffs, under which the mid-stream was always the boundary between the villages;

(4) that the Bilar is not a navigable river and that rules of law as to alluvion and diluvion did not apply in the case of such a small shallow stream.

The Court below held as follows:—

(1) that the plaintiffs were in possession;

(2) that the custom alleged by the plaintiffs was not proved;

(3) that the provisions of S. 4, Cl. I, Regulation XI of 1825, were applicable to the case and that the land in dispute had been gradually cut away from Chandrapar and added to Purnian and, therefore, the plaintiffs in law were the owners thereof. Accordingly the suit was decreed as to the declaration.

The defendants appeal. The first ground of appeal is not pressed.

The points pressed are:

(1) that the plaintiffs have failed to prove possession;

(2) that the law laid down in Regulation XI of 1825 does not apply to the case of a small shallow stream like the Bilar and that the land, being within the boundaries of the *mahal* settled with the defendants, is their property;

(3) that the area in question has not been shown to have been added to the plaintiffs' village by gradual, slow and imperceptible means and, therefore, the plaintiffs at no time acquired title.

On behalf of the respondents it is admitted that the custom of "Dhar-dhura" cannot be pressed, but it is pleaded:

(1) that the plaintiffs' possession is established;

(2) that Regulation XI of 1825 applies;

(3) that the accretion has been gradual and imperceptible and the plaintiffs have thus acquired title;

(4) that in any event the plaintiffs have been in adverse possession and have acquired a title by prescription.

In regard to the application of Regulation XI of 1825, we shall assume for the purposes of this appeal that the law as laid down therein does apply. In the view that we take of the facts it is unnecessary for us to decide the question.

We cannot agree with the Court below that the plaintiffs have proved either their possession or that the accretion has been by slow, gradual and imperceptible means as contemplated by S. 4 of the Regulation.

Furthermore, in the circumstances disclosed by the evidence of the plaintiffs' own witnesses, the plaintiffs could not have acquired title by prescription. In regard to possession we must point out that the burden was on the plaintiffs. The land in dispute admittedly lies within the ambit of the defendants' *zemandari*, and the land revenue assessed thereon has been paid by the defendants. The plaintiffs do not pretend to have ever paid any Government dues for it. They claim that land which at Settlement time was in the defendants' *mahal* is now in their possession and belongs to them, simply by reason of the action of the river. The burden is heavily on them to prove their possession.

Both sides called witnesses who swear in favour of those who have called them and as the lower Court has observed, the oral evidence on the one side is just as good as that on the other and it is not possible to come to a satisfactory conclusion as to which side is telling the truth unless there is something else to guide the Court.

Documentary evidence as to possession there is *nil*. The villages are not subject to quinquennial Settlement. The *patwari* of Purnian has never recorded these lands in his records. The *patwari* of Chandrapar has recorded them as having been cut away by the river. It is highly probable that little heed has been paid until recent years to the lands, as they were sandy waste at first and have only slowly become culturable, and then the dispute arose in the Revenue Courts.

The lower Court has given some curious reasons for holding that the plaintiffs' case must be a true one:

(1) that the land having been gradually cut away and removed to the other side of the river, it is far more likely that the

people on the other side should cultivate rather than that the people of Chandrapar should take the trouble to cross the river with their ploughs and oxen.

In the *first* place as, the plaintiffs' own village *patwari* shows, during the rainy season the land is under water and not culturable and during the rest of the year the stream is shallow and fordable nearly everywhere. During the rains both sets of *zemindars* work their own ferries and the village of Chatrapar is at no greater distance appreciably from the spot than that of Purnian. A great deal of the land is even now uncultivated and the rest must have come very slowly under cultivation. Seeing how tenaciously these *zemindars* cling to their lands and how often riots take place over such cases, we can see no reason to hold that it is far more probable that the Purnian men cultivated than that the Chatrapar men did so. There was no great trouble involved in fording a shallow stream. Next, the Court below considers that because there has been no riot, therefore the Purnian men must have cultivated without let or hindrance. There is no reason to hold that the Purnian men are less law-abiding than the Chatrapar men.

Lastly, the lower Court considers that because in other similar cases in other villages along the Banganga and one or two on the Bilar the people of the villages to which land has been added have been allowed to retain such lands, therefore this must have been done in the present case.

As evidence of actual possession these instances are quite inadmissible, they were put forward simply as evidence of the custom of "Dhar-dhura."

In our opinion there are no circumstances outside the oral evidence which go to show that the plaintiffs rather than the defendants are in possession. The presumption is that the real owners, the defendants, who are paying the revenue are in possession. The oral evidence to prove the plaintiffs' possession is unsatisfactory and we, therefore, hold that the plaintiffs have failed to satisfactorily establish their possession.

The *next* point is the question of the manner in which the land has been cut away from the one village and thrown up on the other side of the river. The burden of proof is on the plaintiffs to show that the accretion to their tenure has been of the nature contemplated by the law as

laid down in the Regulation mentioned and unless they can prove this satisfactorily, they cannot be said to have proved their title.

Their case is that the accretion commenced in 1295 *Fasli* and then up to 1304 *Fasli*, i.e., in 10 years, an area of 26 *bighas* 2 *biswas* and 6 *dhurs* was added to their village and that from 1304 *Fasli* up to 1315 *Fasli*, i.e., in 11 years, an area of 17 *bighas* 7 *biswas* and 9 *dhurs* has been added. The average accretion according to this was 2 *bigha* odd per annum for the whole period. In the period from 1295 *Fasli* the average was a little higher and in the second period somewhat lower.

There is no documentary evidence to show what area was added in any or each of the years in question, as apparently no measurements were ever made until the dispute arose in the Revenue Court. The plaintiffs have to depend on oral evidence only. They have called their *patwari* and some cultivators and neighbours, who state in a general way that the river has gradually cut away its banks and that each year an area of from one to four *bighas* has been thrown up on the other side; they cannot state what area accreted in any one year.

The *patwari* has only held his post as such for a period of 13 years and he found a considerable area on the Purnian side at the time of his appointment. The evidence of several witnesses is to the effect that the river has shifted its bed every year but the extent of its movement in any one year is not given.

One fact is clear. It is only during the three months of the rainy season that the erosion takes place. At other periods the river is shallow and fordable and flows in a very gentle stream.

The boundary between the two villages at Settlement time was but a short one, judging by the map. Its exact length has not been proved, but neither of the villages is large in area. They are roughly speaking about 500 Government *bighas* each. If the boundary between the two villages had been of considerable length and the villages of any great size, then the cutting away of a narrow long strip and its addition to the other village might well be said to be an accretion by gradual, slow and imperceptible means, the area thus added being but a few Government *bighas* per annum.

But where the villages are small in area and their common boundary but short in length, the removal of only a few *bighas*

per annum can hardly be said to be by gradual, slow and imperceptible means. The erosion takes place only in the rainy season. There is not a constant, slow, daily cutting away, spread over a long period. As each flood has come and receded, the area cut away and added to the other side must in the case of these two small villages have been very perceptible. The proportion cut away each year is considerable, though the actual area is not great. Such an area would be of little consequence in the case of large estates on the banks of great rivers containing large volumes of water all through the year. In the present case we have a small river, shallow and fordable, which at one season of the year is liable to sudden floods, cutting away portions from small estates.

We find it impossible to hold that the accretion in this case has been that gradual, slow and imperceptible accretion contemplated by the Regulation.

There remains the question of title acquired by prescription. Even assuming that the plaintiffs have cultivated those portions of the land which became culturable, we have it from the mouth of their own *patwari* that the land is only culturable in the *rabi* season, that it is every year covered with the flood water. While the floods are over the land, the plaintiffs cannot be said to have remained in possession. They have been then dispossessed by *vis major* and in the eyes of the law, the possession during flood time will be deemed to have been in the defendants who had title. To acquire a title by prescription the plaintiffs must hold continuously for a period of 12 years. In the circumstances it has been impossible for them to do this and, therefore impossible for them to acquire title by adverse possession for a period of 12 years.

The law on this point is covered by a decision of their Lordships of the Privy Council and is not contested before us. In our opinion the plaintiffs have failed to prove any title to the land. The custom alleged has not been pressed before us and the lower Court has decided that point in favour of the appellants. We, therefore, allow the appeal, set aside the decree of the Court below and dismiss the suit with costs in both Courts, including in this Court, fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 289

PIGGOTT, J.

Ajodhya Pershad and others—Defendants—Appellants

v.

Mt. Chhabilakoer—Plaintiff—Respondent.

Civil Revn. Petn. No. 44 of 1915, decided on 20th May, 1915, from the order of Munsif, Fatehpur, dated 27th February, 1915.

Civil P. C., (V of 1908), S 115 and O 9, R. 9—Revision against order re-admitting suit dismissed in default lies.

A revision lies against an order re-admitting a suit which has been dismissed for default. Case-law Ref. [P. 290, Cs. 1 & 2.]

S. C. Banerji—for Appellants.

G. M. Banerji—for Respondent.

Judgment:—This is an application in revision by the defendants in a certain suit against an order passed by the Munsif of Fatehpur, whereby a previous order of the same Court dismissing the plaintiff's suit for non-appearance was set aside. The suit had originally been filed in the Court of the Subordinate Judge, but the plaint was returned with directions that it be filed in the Court of the Munsif of Fatehpur. It was dismissed for default of plaintiff's appearance on the 11th January, 1915. An application for re-hearing was made on the 27th January, 1915. A notice having gone to the defendants the question came up for orders on the 20th February, 1915. It was then pointed out to the Munsif that the plaintiff's application for re-admission of his suit had been presented by one Rameshar under a special power-of-attorney. That power-of-attorney being examined, it appeared that it was so worded as to authorize Rameshar to present the plaint and to do all acts that might be necessary for the prosecution of the suit in the Court of the Subordinate Judge, but that it did not authorize Rameshar to take any action on behalf of the plaintiff in the Court of the Munsif of Fatehpur. The learned Munsiff thereupon gave the plaintiff a week's time to put in a fresh power-of-attorney in favour of the same Rameshar. This was done on the 27th February, 1915, and the plaintiff's application for the re-admission of his suit was thereupon allowed on the merits.

With reference to the present application, an objection is taken on behalf of the

plaintiff-opposite party to the effect that an application for revision will not lie against an order re-admitting a suit which has been dismissed for default. The reason suggested is that, if the order re-admitting the suit is an improper one, it can be challenged in appeal under the provisions of S. 105 of the Civil Procedure Code. In a case which recently came before me as a single Judge I accepted this contention. The matter was subsequently argued before a Bench of two Judges of which I was a member. The case was that of *Janki Prasad v. Parmeswar Din Pandey* (1). The question whether an application for revision was admissible at all against an order setting aside an *ex parte* decree is not discussed in the reported judgment. As a matter of fact it was raised, but we passed it over on the authority of *Tasadduq Husain v. Hayat-un-nissa* (2). This followed a decision of the Calcutta High Court, *Chintamony Dassi v. Raghoonath Sahoo* (3), and a previous case of this Court, *Gulab Kunwar v. Thakur Das* (4). There is, however, a more recent reported case of this Court in the opposite sense, *viz.*, *Nand Ram v. Bhopal Singh* (5). That was a two Judges' case but it would not appear from the report that the second Judge was of opinion that the application for revision was not maintainable. The learned Judge who took that view does not refer to the older decisions of this Court which I have already discussed, but supports himself principally by the case of *Gopala Chetti v. Subbier* (6). If I were to decide the point independently of all authorities, I should, as at present advised, be much inclined to adhere to the view I first took when sitting as a single Judge. Section 105 of the Code of Civil Procedure allows any order affecting the decision of the case to be challenged in an appeal from the final decree. There is certainly force in the contention that the words "affecting the decision of the case" are perfectly general and that their sense should not be limited by judicial decisions. The preponderance of authority in this Court, however, seems to be in favour of the view that the propriety of an order setting aside an *ex parte* decree cannot be challenged in an appeal from such decree

as may eventually be passed in the suit. If this view is correct the only remedy open to a litigant aggrieved by such an order is by way of application in revision.

However this may be, on the facts of the particular case before me, I am not disposed to interfere. The power-of-attorney in favour of Rameshar which was produced before the learned Munsif on the 27th February, 1915, either had retrospective effect, or it had not. If it had, there is no force in this application. If it had not, then the plaint itself was never properly before the Munsif, for it was presented through a Pleader appointed by this very Rameshar. The matter is one in which it would be well for the parties to reconsider their position: but undoubtedly if the learned Munsif has taken cognizance of a plaint which had never been legally presented in his Court, this is a point which it is still open to the defendants to raise. I decline to interfere at this stage and reject the application.

Application rejected.

A. I. R. 1915 Allahabad 290

RICHARDS, C. J. AND PIGGOTT, J.

Secretary of State—Defendant-Appellant

v.

Jwahir Lal—Plaintiff-Respondent.

First Appeal No. 225 of 1912, decided on 16th March, 1915, from the decision of the Sub-J., Shahjahanpur, dated 4th April, 1912.

Pensions Act (XXIII of 1871), Ss. 4 and 6—Civil Court has no jurisdiction to make declaration affecting Government revenue.

A Civil Court is precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay a grant of Government revenue to any person. [P. 292, Cs. 1 & 2.]

Ryves—for Appellant.

B. E. O'Connor, Benode Bihari and S. K. Dar—for Respondent.

Judgment:—This appeal arises out of a suit in which the plaintiff claimed a declaration that he has "proprietary rights in ten *biswas* of revenue-free grant in each of the three *mahals* Nur Muhammad, Farhat Fatima and Intizamuddin in *Mouza* Lakhimpur," and that the name of the Government may be expunged. The claim does not appear to be accurately expressed. What the plaintiff really claims is

(1) (1915) 29 I. C. 975.

(2) (1903) 25 All. 280=1903 A.W.N. 39.

(3) (1895) 22 Cal. 981.

(4) (1902) 24 All. 464=1902 A.W.N. 136.

(5) (1912) 16 I. C. 1=34 All. 592.

(6) (1903) 26 Mad. 604=18 M.L.J. 303.

that in the events which have happened, he is now entitled to be considered as the assignee of the Government revenue payable in respect of the 10 *biswas*. His real claim is that the last assignee of this Government revenue was one Dalpat Rai, who died leaving a daughter *Mt. Ram Piare*. He claims that now he is entitled as the heir of Dalpat Rai under Hindu Law, to have the same rights as Dalpat Rai enjoyed.

The Court below granted the plaintiff a decree declaring that he is entitled, by right of succession to Dalpat Rai as the *muafidar* or assignee of the Government revenue, to the revenue of the 10 *biswas* share in *mahals*.

The Secretary of State has appealed, and it is contended, *first*, that the Court below ought not to have entertained the suit because the plaintiff had not obtained the certificate referred to in Ss. 5 and 6 of Act XXIII of 1871; *secondly*, that the decree of the Court below is in contravention of the provisions of S. 6 of the same Act; and *thirdly*, that the title which Dalpat Rai had, to be deemed the assignee of the Government revenue, came to an end with his lineal descendants.

The plaintiff submits that the provisions of Ss. 5 and 6 do not apply; *secondly*, that if it was necessary to obtain a certificate, he did in fact obtain one, and *thirdly*, that the decree of the Court below does not in any way contravene the provisions of S. 6.

It appears that sometime after the year 1902 the plaintiff brought a suit in respect of a certain *zemindari* which belonged to Dalpat Rai. He succeeded then in establishing his title to the property he sued for. He did not in that suit include the Government revenue which he now claims. As a matter of fact he had already assigned it to third parties. A vendee from the plaintiff also brought a suit in respect of some other *zemindari* which had at one time belonged to Dalpat Rai. In that case the Court dismissed the suit, on the ground that the then plaintiff had failed to prove that the present plaintiff was the reversioner to Dalpat Rai.

Section 4 of Act XXIII of 1871 is as follows:—"Except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for

any such pension or grant, and whatever may have been the nature of the payment, claim, or right for which such pension or grant may have been substituted." Section 5, "Any person having a claim relating to any such pension or grant may prefer such claim...to the Collector of the District, or Deputy Commissioner, or other officer shall dispose of such claim in accordance with such rules as the Chief Revenue Authority may, subject to the general control of the Local Government, from time to time prescribe in this behalf." Section 6, "A Civil Court, otherwise competent to try the same, shall take cognizance of any such claim upon receiving a certificate from such Collector, Deputy Commissioner, or other officer authorised in that behalf that the case may be so tried, but shall not make any order or decree in any suit whatever by which the liability of Government to pay any such pension or grant as aforesaid is affected directly or indirectly."

The plaintiff seems to have procured a certificate, dated the 5th of November, 1902, probably in connection with the previous suit to which we have already referred. This certificate will be found at page 7 of the respondent's book. The plaintiff contends that if the provisions of Act XXIII of 1871 applied to the present case, then the production of that certificate is a sufficient compliance with the provisions of S. 6. The argument of the plaintiff that the provisions of S. 6 of Act XXIII of 1871 do not apply to his case, is based on the decision of their Lordships of the Privy Council in the case of *Secretary of State for India v. J. Moment* (1). In that case it was held that certain provisions in the Burma Act (IV of 1898) were *ultra vires* in so far as it enacted that no Civil Court should have jurisdiction to determine any claim to any right over land as against the Government. Their Lordships referred to the Act of 1858 and to the Indian Councils Act of 1861. By S. 65 of the Act of 1858 it was provided that, "The Secretary of State in Council shall and may sue and be sued as well in India as in England by the name of the Secretary of State in Council as a body corporate; and all persons and bodies politic shall and may have and take the same suits, remedies and proceedings, legal and equitable,

(1) (1913) 18 I. C. 22=40 Cal. 391=40 I.A. 48 (P.C.).

against the Secretary of State in Council for India as they could have done against the said Company." Their Lordships proceed as follows: "Their Lordships are of opinion that the effect of S. 65 of the Act of 1858 was to debar the Government of India from passing any Act which could prevent a subject from suing the Secretary of State in Council in a Civil Court in any case in which he could have similarly sued the East India Company." On referring to Act XXIII of 1871 it will be found that until the passing of that Act there had been a Regulation in force, namely, XXIV of 1793, S. 17 of which barred the jurisdiction of Civil Courts in a suit like the present. This section was repealed by Act XXIII of 1871. It would, therefore, seem that the East India Company could not have been sued at the time of the transfer of its powers and liabilities to the Crown. The case cited, therefore, does not apply to the present case. If the provisions of S. 6 do apply, it was necessary that the plaintiff should produce the certificate specified in this section. It seems to us that the certificate which in fact was produced is not a compliance with the section. In the first place it is dated 1902, long before the present claim was contemplated. It was a certificate that the claim of Jwahir for *resumption of a muafi grant* might be tried by a Civil Court. At that time, there were rival claimants to the property of Dalpat Rai. The present suit is not a suit to establish the right of one of two rival claimants but is a suit against the Secretary of State in Council. Furthermore, it seems to us that we could not possibly make a decree declaring that the plaintiff was the assignee of the Government revenue without "making an order or a decree which would directly or indirectly affect the liability of Government to pay a grant of the Government revenue." The original *sanad* is not on the record. Such evidence as there is shows that it was a grant "*naslan bad naslan*," that is to say, "from generation to generation." It is not usual to make a grant of Government revenue by way of absolute grant, and if the grant was only made to the original grantee and his lineal descendants then the plaintiff has no claim. Admittedly he is not a lineal descendant. If on the other hand, it was a grant of the absolute interest, then the owner for the time being could do what he liked with the subject-matter of the

grant. If the grant was of this nature, then the plaintiff by his own admission has alienated the revenue to third parties in which case he has no title. The plaintiff asks that in any event we should give him a declaration that he is the nearest reversioner to Dalpat Rai. The Court below has found that he is the nearest reversioner. As already pointed out, in one previous suit he satisfied the Court that he was the nearest reversioner. On the other hand, a vendee from him failed to prove in another Court that the plaintiff was the nearest reversioner of Dalpat Rai. The plaintiff says that a declaration of this kind may help him to come to a settlement with the Government. We do not feel called upon to decide the question, but at the same time we do not express any disagreement with the finding of the Court below. In our opinion we are precluded from making any declaration that would in any way directly or indirectly affect the liability of Government to pay this revenue to the plaintiff. We, therefore, think upon all these grounds that the plaintiff's suit was misconceived and ought to have been dismissed.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the plaintiff's claim with costs in all Courts. Costs in this Court will include fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 292

RICHARDS, C. J. AND TUDBALL, J.

Munna Lal—Defendant-Appellant

v.

Kalika Bakhsh Singh—(Plaintiff) and others (Defendants)—Respondents.

Second Appeal No. 1009 of 1913, decided on 20th May, 1915, from a decision of the Sessions and Sub-J., Jaunpur, dated 28th May, 1913.

Pre-emption — *Wajib-ul arz* — *Ek-jaddi co-sharer held to have preferential right.*

Where a *wajib-ul-arz* provided: "The right of purchase at the price, which a stranger may give, shall be prior in favour of the *ek-jaddi* co-sharer, after that with the co sharers in the *mahal*, after they refuse, the property may be sold to a stranger":

Held, that the *ek jaddi* co-sharer had a preferential claim over a co-sharer in the *mahal*. (6 I.C. 920, *Ref.*). [P. 293, C. 1.]

Gokul Prasad—for Appellant.

Haribans Sahai—for Respondents.

Judgment :—This appeal arises out of a suit for pre-emption. The plaintiff has been found to be an *ek-jaddi* co-sharer with the vendor. We may assume, (although it was not admitted in the Court below) that the defendant-vendee is a co-sharer in the *mahal* but not *ek-jaddi*. The defendant pleaded, amongst other pleas, that the right of pre-emption only arose in the case of a sale to a stranger and that in any event the sale had taken place after the plaintiff had refused to purchase. The Court below has decided against the defendant, hence the present appeal.

In the entry in the *wajib-ul-arz* a number of words are left to be understood. The meaning, however, seems to be pretty clear. It may be literally translated as follows :—

“The right of purchase at the price which a stranger may give shall be prior (in favour of) the *ek jaddi* co-sharer, after that with the co sharers in the *mahal*, after they refuse the property may be sold to a stranger.” The only reason for holding that this limits the right of pre-emption to a case where the property is sold to a stranger, is the introduction of the words “at the price which the stranger may give.” The clause appears to us to be very similar to the clause in the *wajib-ul-arz* referred to in the case of *Gurdial v. Mathura Singh* (1). In that case the *wajib-ul-arz* extract was translated as follows :—

“If any co-sharer should wish to sell or mortgage his property, then first he shall transfer it to a co-sharer in the *patti* and after that to other *pattidars* of the *mahal* and after that to the owners of the other *mahals* and in case of their refusal, he is at liberty to transfer it to an outsider at the same price as a stranger would be willing to give.” In this case it was held that the words “at the price a stranger would be willing to give” were introduced for the purpose of regulating the price. It seems to us that where the custom, (as proved by the record in the *wajib ul-arz*) is that the co-sharer desirous of selling his property must first offer it to his co-sharer in the *patti* and after him to other co-sharers and that if they refuse he can sell to a stranger, it can hardly be said that a co-sharer who has sold to a stranger after he has offered to sell to the persons entitled one after the other

according to the priority of their right, has violated the custom merely because he has not concluded his bargain with the stranger before he made the offer. Of course the offer must be a *bona fide* offer and if the persons having a right of pre-emption wanted to know the price or any other particular, they would be entitled to be informed. We need hardly say that the vendor would not be entitled to sell the property for a less price than the price he mentioned to the pre-emptors.

It is contended on behalf of the defendant that in the present case the vendor offered the property to the plaintiff before the sale-deed was executed and that the plaintiff refused to purchase. It is contended that the Court below in finding this issue against him had in its mind that it was necessary that the whole contract should have been communicated to the plaintiff, and that his (the plaintiff's) refusal to purchase was of no consequence until the entire contract was so communicated. This no doubt might have been the view taken by the Court below. We have, therefore looked at the evidence of the witnesses on this part of the case. The vendee said that when he had arranged to buy, he told the vendor to call the other co-sharers including the plaintiff, that they were called and that he asked them if there would be any dispute about the property, that they said, “no”, that he might have that sale-deed executed. Another witness stated that he and some of the other co-sharers happened to be passing by the place where the vendee spread his bricks, that they went over when the vendee called them and they were informed about the sale and that they said they did not want to purchase. It is quite clear that the Court below disbelieved this evidence and did not decide the issue merely on the ground that the price had not been fixed. The two witnesses, it is to be observed, do not tell quite the same story. We must consider the finding of the Court below to be a finding of fact that the plaintiff did not refuse to purchase the property. In this view the appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 294

RICHARDS, C. J. AND TUDBALL J.

Mst. Nathu and others—Defendants-Appellants

v.

Shadi—Plaintiff-Respondent.

Second Appeal No. 338 of 1914, decided on 25th May, 1915, from the decision of the Dist. J., Saharanpur, dated 13th January, 1914.

(a) *Mahomedan Law—Pre-emption—Second demand not necessary if witnesses and vendee present at first demand.*

Where at the time when the sale came to the knowledge of the pre-emptor, the vendee as well as the witnesses were present, and the pre-emptor at once claimed his right of pre-emption invoking the witnesses :

Held, that it was not necessary under Muhammadan Law for the pre-emptor to make the second demand. (10 Cal. 1003, *Ref.*).

[P. 294, Cs. 1 & 2.]

(b) *Mahomedan Law—Pre-emption—Right arises even in transfer in lieu of dower debt.*

A right of pre-emption arises under the Muhammadan Law even where property is transferred by a husband to his wife in consideration of dower-debt. (5 All. 65, *Foll.*).

[P. 294, C. 2.]

Sulaiman—for Appellants.*Durga Charan Banerji*—for Respondent.

Judgment :—This is a defendant's appeal arising out of a suit for pre-emption. The pre-emptor's claim was based on Muhammadan Law. Both the Courts below have decreed the claim and the defendant-vendee comes here in second appeal. The vendor is the husband of the vendee and the property was sold to the lady in lieu of her dower-debt. The plea taken before us is that the preliminary demands were not properly satisfied and, therefore, the suit ought to have been dismissed. The facts are that at the time when the sale came to the knowledge of the plaintiff-pre-emptor, the vendee was present and witnesses also were present. The plaintiff at once claimed his right of pre-emption invoking the witnesses. It is urged that the two demands ought to have been made separately, one immediately after the other, that practically only one demand was made and that does not satisfy the requirements of Muhammadan Law. The authorities are against the appellant; as Mr. Justice Ameer Ali in his book points out, if at the time of the *talab-i-muwabat* the pre-emptor had an opportunity of invoking witnesses in the presence of the seller or the purchaser, or on the

premises to attest the immediate demand, it would suffice for both the demands and there would be no necessity for the second. The reason of this is obvious. A pre-emptor under the Muhammadan Law directly he hears of the sale has to at once make a demand wherever he may be, whether the purchaser or the seller are or are not present, whether witnesses are or are not present, but it is necessary for him to convey knowledge of his demand to the vendee or the vendor and to call attention to the fact that he did make his first demand and to invoke his witnesses to that effect. Where all the parties are present and the witnesses are present, it is sufficient for him to make his claim and call the attention of the witnesses to the fact that he is doing so and that he insists upon his right. [See the remarks in *Nundo Pershad Thakur v. Gopal Thakur* (1).]

The next contention is that no right of pre-emption can arise where property is transferred by a husband to his wife in lieu of the dower-debt. This contention is based upon a passage to be found in Mr. Ameer Ali's book, page 713, Volume I (4th Edition). No other authority has been cited. On the other hand, there is a decision of this Court in *Fida Ali v. Muzaffar Ali* (2), which is based upon a much older decision of the Sadr Dewani Adalat of 1864. Mr. Ameer Ali challenges this decision, saying that it appears to proceed on a wrong interpretation of the law, but he does not point out the error or consider the question any further. We think that we should follow the ruling of this Court and we, therefore, hold that under the circumstances of the present case the right of pre-emption did arise.

The result is that the appeal fails and is dismissed with costs, including fees on the higher scale.

Appeal dismissed.

(1) (1884) 10 Cal. 1003.

(2) (1889) 5 All. 65=1892 A.W.N. 175.

A. I. R. 1915 Allahabad 295 (1)

CHAMIER, J.

Jwala Prasad Rai and another—Plaintiffs—Appellants

v.

Ram Sarup Rai and others—Defendants—Respondents.

Second Appeal No. 1168 of 1914, decided on 29th June, 1915, from the decision of the Sub-J., Ghazipur, dated 19th June, 1914.

Occupancy holding—Mortgage of occupancy and fixed rate holding together vitrates the whole transaction—Contract Act (IX of 1872), S. 24.

Where an occupancy holding and a fixed-rate holding are mortgaged together for a lump sum, and the contract is one and indivisible the whole transaction is void. [P. 295, C. 2]

Bajpai—for Appellants.*M. L. Agarwala*—for Respondents.

Judgment:—*Musammatt* Jhiria, represented in this suit by her heir Deoki, who was at first plaintiff No. 1 but subsequently became defendant No. 13, mortgaged five plots of land to Sukhdeo Rai in July 1877. Shortly before this suit was brought Deoki transferred to *Jwala Prasad* and *Siri Kishun*, the present appellants, 9 or 10 plots which are said to include the five plots covered by the mortgage. The appellants on the strength of the sale-deed sued the representatives of the original mortgagee for redemption of the five plots mortgaged. The Munsif decreed the claim, but his decision was reversed by the Subordinate Judge who held that as the deed of sale in favour of the present appellants included plots which were part of an occupancy holding and therefore, not legally transferable, the deed of sale was void and conferred no title upon the appellants. There is no definite finding and Counsel in this Court are not agreed as to which of the plots are part of the occupancy holding and which are part of a fixed-rate holding. Counsel for the respondents maintains that all five plots mortgaged were held by the mortgagor as an occupancy tenant. The learned *Vakil* for the appellants maintains that Nos. 167 and 169/1 mentioned in the sale-deed correspond with No. 129 mentioned in the mortgage. If Counsel for the respondents is right, there can be no doubt whatever that this appeal should be dismissed for the appellants as transferees of an occu-

pancy holding have clearly no right to maintain this suit. I will assume, however, that one of the plots covered by the mortgage (No. 129) was part of a fixed-rate holding and that the transfer to the appellants covered an occupancy holding and also part of a fixed-rate holding. It is contended that the transfer was valid as regards plot No. 129 and conferred upon the appellants at least a right to redeem that plot. The respondents, on the other hand, objected to the redemption of one plot only. It appears to me that the Subordinate Judge was right in dismissing this suit. Regarded in the light most favourable to the appellants, the transfer was a transfer of parts of an occupancy and of fixed-rate holding for a lump sum. The contract was one and indivisible, and it seems to me that as the transfer of an occupancy holding is void the whole transfer failed. But apart from that, it appears to me that the appellants are not entitled to pick out one of the plots in possession of the respondents and redeem that leaving them with the other plots. The appeal is dismissed with costs, including fees on the higher scale.

*Appeal dismissed.***A. I. R. 1915 Allahabad 295 (2)**

TUDBALL, J.

Banarsi Das and Co.—Defendants—Appellants—Applicants.

v.

Lulla Mal—Plaintiff - Respondent - Opposite Party.

Civil Revn. Petn. No. 50 of 1915, decided on 8th July, 1915, from the order of the Sm. C. Court J., Agra, dated 7th December, 1914.

(a) *Evidence Act (I of 1872), S. 92—Terms inconsistent to written contract cannot be proved.*

It is not open to a party to a written contract to prove a contract the terms of which are clearly inconsistent with the terms of the written contract. [P. 926, C. 2.]

(b) *Contract Act (IX of 1872), Ss. 73 and 75—Actual damage must be proved.*

Sections 73 and 75 of the Contract Act make it compulsory on the plaintiff to show that he has suffered and the extent to which he has suffered, before a Court can award him damages for a breach of contract. (10 Bom. L. R. 1113, *Ref. to*). [P. 297, C. 1.]

S. K. Dar—for Applicants.*Narain Prasad*—for Opposite Party.

Judgment :—This is an application for revision arising out of a suit brought in the Court of Small Causes at Agra to recover the sum of Rs. 150 as damages for breach of contract. The plaintiff's case put briefly was, that the appellants had agreed to deliver to him certain goods at certain price in a certain month at Agra, that they had failed to fulfil their contract, that they had subsequently tendered the goods after considerable delay, and that these goods were not up to sample, and he, therefore, by reason of a breach of contract had suffered damage to the extent of Rs. 150. Many pleas were taken in defence. *One* raised the question of jurisdiction, namely, that the suit was not cognisable in the Court at Agra; *another* was that under the terms of the agreement made between the parties, the dispute had to be settled by arbitration and, therefore, the jurisdiction of the Court had been ousted; the *third* was that the plaintiff had suffered no damages. There were many other pleas which it is unnecessary to mention. The Court held that it had jurisdiction, that both parties had thrown on one side the agreement to settle their disputes by arbitration and, therefore, that agreement was no longer binding. In regard to damages it held that though the plaintiff had failed to prove what damage he had suffered, still he was entitled, to some damage and awarded "*nominal*" damages. The defendants have come here in revision and most of the legal points have been again pressed before me.

In so far as the question of arbitration was concerned, it seems to me that the Court below was quite right for it is clear that both parties had thrown over so much of their agreement as related to arbitration. Neither side had attempted to enforce that clause and both sides, as a matter of fact, had gone into Court to enforce their rights. The question of jurisdiction depends entirely upon the contract which was made between the parties. The defendants were agents of an English firm. That English firm manufactured cloth in England, and sold its goods on certain terms which are embodied in a document which has been described in this suit as an "*indent*" and which has been signed by the plaintiff in the present suit. According to the terms of that document the goods were to be delivered in Bombay, and the payment was to be made by the plaintiff at Delhi. The Court below came to the conclusion that because the condi-

tions in question were all set out in English, and the plaintiff did not know that language, therefore, it must be presumed that they did not understand what they were signing. Further, it has come to the conclusion that the plaintiff received an assurance that the goods would actually be delivered to him at Agra on payment by him of the value into the Bank at Agra, and that this assurance was made at the time that the defendant invited the plaintiff to purchase the goods. It would be somewhat difficult, I must admit, to accept the inference drawn by the Court below that as the conditions of the document were in English, therefore, the plaintiff did not understand it. As a matter of fact such documents are very common indeed in this country, and those persons who habitually deal in cotton goods as a rule fully understand all that is set out therein. The document clearly and distinctly sets forth that the goods shall be shipped to Bombay and the meaning clearly is that the purchaser must make his own arrangements to take delivery from Bombay and convey to his own shop. Lastly, the lower Court has held that the contract was not completed on the 16th of December 1912, that on that date the plaintiff signed the document which constituted an offer to purchase on these terms, that the offer was communicated to the firm in England, accepted by it, and then the acceptance of the offer was sent by the defendants from Delhi by post to the plaintiff at Agra. The contract, therefore, was completed at Delhi and the verbal assurance of a *dalal*, on the 16th of December, 1912, could form no part of the contract. It may be that a firm, like that of the defendants, does, as a matter of fact, assist purchasers in getting their goods cleared at Bombay and conveyed to their place of business, although it is no part of the contract entered into between the parties. On the lower Court's own finding the plaintiff purchased on the conditions entered in the document, and the offer to purchase on these conditions was subsequently accepted. It is not open, in my opinion, to the plaintiff to prove a contract the terms of which are clearly inconsistent with the terms of the written contract. Therefore, in my opinion, no portion of the cause of action arose at Agra and the Court at Agra had no jurisdiction to entertain the suit. The contract was not made at Agra; no portion of it had to be carried out in Agra; delivery

was to be at Bombay and payment was to be made at Delhi. It, therefore, seems to me that the decision of the Court below cannot be allowed to stand. But there is another point which clearly affects the plaintiff's case. The lower Court in its judgment was clearly of opinion that the plaintiff had failed to prove what damage he had suffered. It was clearly of opinion that the plaintiff refused to take delivery of the goods because, as a matter of fact, the price had considerably fallen and it was to his advantage to refuse to take delivery. Section 73 of the Contract Act clearly lays down that when a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract compensation for any loss or damage caused to him thereby. If S. 73 applies and not S. 75, as has been urged on behalf of the defendants, even then it was for the plaintiff to show that he had suffered from the breach of contract and the extent of his suffering. The finding of the Court below is that the plaintiff had actually gained instead of suffered, and it has awarded to the plaintiff not the damage which was caused to him by the breach of contract, but what it was pleased to call nominal damages to the extent of Rs. 75. If S. 75 applied to the present case (and I would note that the plaintiff had stated that he did rescind the contract) it is clear that the person who rescinds a contract is entitled to compensation for the damage which he has actually sustained through the non-fulfilment of the contract. Whatever the English Law on the subject may be it is quite clear, in my opinion, that Ss. 73 and 75 make it compulsory on the plaintiff to show that he has suffered and the extent to which he has suffered, before the Court can award him damages for the breach of contract. The point was considered in *P. R. & Co v. Bhagwandas Chaturbhuj* (1). Mr. Justice Knight who decided that case remarked as follows:—

“Studied in the light of this illustration, I am convinced that the Indian Act does not sanction or permit an action for breach of contract of sale save where specific damage is proved to have resulted from that breach. Section 73 not only confines the right of relief to the party who suffers, but provides how his loss is to be measured, what it is to include and what

to exclude and what circumstances the Court must take into account in estimating the loss. For the party who does not prove that he has suffered it provides no relief whatever.” In my opinion on both these points, the plaintiff's case ought to have failed and should have been dismissed. I allow the application. I set aside the decree of the Court below and the plaintiff's suit will stand dismissed with costs in both Courts.

Decree set aside.

A. I. R. 1915 Allahabad 297.

PIGGOTT, J.

Mt. Kazmi Jan—Plaintiff-Appellant

v.

Shib Charan—Defendant-Respondent.

Second Appeal No. 1057 of 1914, decided on 14th June, 1915, from the decision of the Addl. J., Moradabad, dated 21st April, 1913.

Mahomedan Law—Debts—Creditor of deceased cannot follow estate in hands of bona fide transferee from heir.

A creditor of a deceased Muhammadan cannot follow his estate into the hands of a bona fide purchaser for value to whom it has been alienated by an heir-at-law, whether the alienation had been by an absolute sale or by a mortgage.

[P. 298, C. 2]

One A mortgaged a house to the predecessors-in-title of the plaintiff. On A's death, his widow, J, mortgaged the same house to the defendant. The plaintiff brought a suit on his mortgage impleading the present defendant as a subsequent mortgagee, but he got only a simple money-decree in execution of which he put the house to sale and purchased it on 23rd June, 1913. In the meantime the defendant had brought a suit upon his mortgage and obtained a decree for sale of the house on the 24th September, 1912. The plaintiff then brought the present suit for a declaration that the house was not saleable in execution of the defendant's decree.

Held, that the plaintiff, by his auction-purchase, acquired no title to the house which could override the rights of the defendant under his mortgage or under his decree. (26 All. 28, Ref.) [P. 298, C. 2.]

Muhammad Ishaq Khan—for Appellant.

Mohan Lal Sandal—for Respondent.

Judgment :—It appears that one Imdad Ali mortgaged, in the year 1897, a house to a person whose heirs subsequently transferred their rights under the mortgage to the present plaintiff-appellant. Imdad Ali died and his widow, *Mt. Iradatunnissa*, in the year 1907, mortgaged

the same house to the present defendant-respondent. The plaintiff brought a suit upon his mortgage impleading the present defendant as a subsequent mortgagee of the property in suit. For reasons which have not been made apparent, the Court gave the plaintiff a simple money-decree enforceable against the assets of Imdad Ali in the hands of any of the defendants. In execution of this decree the plaintiff attached the house in question, brought it to sale, and purchased it himself obtaining possession on June the 23rd, 1913. In the meantime the defendant had brought a suit upon his mortgage against *Mt. Iradatunnissa*, and on the 24th of September, 1912 had obtained a decree for sale of a fractional share in the said house representing the share which came to *Mt. Iradatunnissa* by inheritance. The present suit was one for a declaration that the house in question is not liable to sale in execution of the defendant's decree. The suit was decreed by the Court of first instance; but on appeal the learned District Judge came to the conclusion that the suit for a declaration was not maintainable and he dismissed it accordingly. Acting, however, on some admission made before him by the defendant he has given the plaintiff a simple money-decree for Rs. 50, which appears to be the amount of his decree without interest. The plaintiff appeals to this Court contending, in the first place, that the suit for a declaration should have been decreed and *secondly*, that if any money-decree was passed it should have included interest up to-date. In so far as any argument has been addressed to me in support of the appeal based upon the fact that the defendant was a party to the plaintiff's suit upon his mortgage, I find no force in the contention. The suit as brought upon the mortgage of 1897 was dismissed. Whatever defence was set up in that case by the defendant Shib Charan it must have completely succeeded, for he was in no way affected by the decree actually passed. Even if by some oversight the simple money-decree was left to stand as a joint decree against all the defendants, the fact that it is recoverable only out of the assets of Imdad Ali in the hands of such defendants would in itself free Shib Charan from all liability thereunder. The real contention pressed on behalf of the appellant is that the debt due to the plaintiff as a creditor of Imdad Ali must have priority over the debt due to the defendant Sahib Charan

as a creditor of one of Imdad Ali's heirs. In support of this contention I have been referred to certain general principles laid down in Wilson's Digest of Muhammadan Law and also to the case of *Bhola Nath v. Maqbul-un nissa* (1). The whole trend of the argument for the appellant overlooks the fact that Shib Charan's position is not merely that of a creditor of *Mt. Iradatunnissa*, but of a transferee of a portion of Imdad Ali's estate from one of his heirs. The general principle that a creditor of a deceased Muhammadan cannot follow his estate into the hands of a *bona fide* purchaser for value to whom it has been alienated by an heir-at-law, whether the alienation had been by an absolute sale or by a mortgage, was re-affirmed by the learned Judges of this Court who decided the case of *Bhola Nath v. Maqbul-un nissa* (1) (*Vide* page 32 of the report). It is also laid down clearly in those passages of Mr. Saiyed Ameer Ali's book on Muhammadan Law which are referred to in the judgment of the lower Appellate Court. In my opinion the plaintiff by his auction-purchase acquired no title to the house in question which could override the rights of the defendant Sahib Charan under his mortgage of 1907 or under his decree of 1912. The house in question or rather *Mt. Iradat-un-nissa's* share in the same is liable to sale under the defendant's decree and no declaration to the contrary can be made. The plaintiff has obtained a money-decree in his favour which could not, in my opinion, have been passed except on the admission of the defendant. I presume it to have been validly passed, as it is not challenged by way of appeal or cross-objections on the part of the defendant but I certainly cannot add to it by allowing interest as contended for in the last plea in this memorandum of appeal. The result is that I dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

(1) (1904) 26 All. 28=1903 A.W.N. 184.

A. I. R. 1915 Allahabad 299.

PIGGOTT, J.

Mt. Ram Piari—Defendant-Appellant
v.*Raghunath Singh and others*—Plaintiffs-
Defendants-Respondents.

Second Appeal No. 723 of 1914, decided on 1st June, 1915, from the decision of the Dist. J., Farrukhabad, dated 14th February, 1914.

Transfer of Property Act (IV of 1882), Ss. 60, 67, 74 and 91—Subsequent mortgagees though holding rights under a prior mortgage by redemption cannot be forced to set up their rights and are entitled to redeem puisne mortgage—Puisne mortgagees having purchased equity of redemption in auction-sale was held entitled to redeem plaintiff's subsequent mortgagees.

One K S was the owner of a certain *zamindari*. One of the four sons of K S mortgaged a one-fourth share to the father of R, the defendant, on the 7th of December, 1877. On July 27th, 1877, the whole property was usufructually mortgaged by the four sons to Z. The entire consideration of Z's mortgage went towards satisfying a decree for sale obtained on a previous mortgage of 1872. The plaintiffs, having acquired certain shares in the equity of redemption from some of the descendants of K S, redeemed the entire mortgage from Z. R brought a suit on her father's mortgage and she impleaded only the son of her mortgagor and also Z, but not the present plaintiffs. She obtained a decree for sale of the one-fourth share and purchased it herself. The plaintiffs then brought the present suit for redemption of the mortgage of December 7th, 1877:

Held, that the plaintiffs were entitled to redeem the mortgage of the 7th of December, 1877 and that whatever rights Z or the plaintiffs, as her successors-in-interest, might hold in respect of the mortgage of 1872, these were not rights which the plaintiffs could be compelled to set up or to exercise against their will and that the possible existence of such rights did not affect the position of the plaintiffs as mortgagees subsequent to the defendant.

[P. 299, C. 2 and P. 300, C. 1.]

Held, further, that R as auction-purchaser of the equity of redemption, had a right of redemption. 28 Bom. 153, *Ref.*

[P. 300, C. 1.]

Tej Bahadur Sapru—for Appellant.*Sowhny*—for Respondents.

Judgment:—The somewhat complicated facts out of which this second appeal arises are fully given in the judgment of the lower Appellate Court. The essential point in issue admits of being briefly stated. There was a certain *zamindari* property belonging to a family descended from one Khuwat Singh. A one-fourth share in this *zamindari* property was mortgaged by one of the four sons of the said Khuwat Singh to the father of *Mt. Rampiyari*, the present defendant-appellant. The date of this mortgage was December

7th, 1877. On July, 27th, 1887, the whole of the property in question was mortgaged by the four sons of Khuwat Singh, with possession, to one *Mt. Zaibunnissa*. The plaintiffs in the present suit acquired certain share in the equity of redemption from some of the descendants of Khuwat Singh and on the strength of this acquisition have redeemed the entire mortgage in favour of *Mt. Zaibunnissa*, and have apparently obtained possession. Subsequently *Mt. Rampiyari* brought a suit on her father's mortgage of December 7th, 1877, in which she impleaded only the son of her mortgagor, and also *Mt. Zaibunnissa*, who had at the time no interest in the property in question, as her mortgage had been paid off. She did not implead the present plaintiffs. She got a decree for sale in respect of the one-fourth share covered by her mortgage, brought that share to sale and purchased it herself. Whether she has or has not succeeded in obtaining effective possession of this one-fourth share as against the plaintiff is not clear from the pleadings on the evidence in the case. The present suit is by the plaintiffs for redemption of the mortgage of December 7th, 1877, in favour of *Mt. Rampiyari's* father. The suit was dismissed by the Court of first instance, but has been decreed on appeal. In both the Courts below the only point actually decided was a very narrow one. It appears that the entire consideration of *Mt. Zaibunnissa's* mortgage of July 27th, 1887, went towards satisfying a decree for sale which had been obtained on a previous mortgage, affecting the entire property of Khuwat Singh, executed on April 16th, 1872. *Mt. Rampiyari* contends that the plaintiffs have succeeded to the rights of *Mt. Zaibunnissa* in respect of her mortgage of July 16th, 1872. The argument is that *Mt. Zaibunnissa* could have held up this prior mortgage as a shield in any suit brought against her in respect of her mortgage of July 27th, 1887, that she was, therefore, in effect a prior mortgagee as compared with the father of *Mt. Rampiyari* and not a subsequent mortgagee. I agree with the learned District Judge that, whatever rights *Mt. Zaibunnissa*, or the plaintiffs as her successors-in-interest, might hold in respect of the mortgage of July 16th, 1872, these were not rights which the plaintiffs could be compelled to set up or to exercise against their Will. The possible existence of such rights does

not, therefore, affect the position of these plaintiffs as mortgagees subsequent to the defendant-appellant. Had they been impleaded in the suit brought by the latter on her father's mortgage, they would not have been bound to set up any claim in respect of the mortgage of July 16th, 1872, and they might have been content to exercise the right of redemption which they possess as subsequent mortgagees under the deed of July 27th, 1887. They were deprived of this option by not being impleaded as defendants in the suit for sale brought by *Mt. Rampiyari*. I hold, therefore, that these plaintiffs possess an existing right of redemption in respect of the mortgage of December 7th, 1877, which they are entitled to exercise, as they claim to do, in the present suit.

The memorandum of appeal to this Court raises a further point, about which I feel considerable difficulty. *Mt. Rampiyari's* present position is not merely that of a mortgagee under the deed of December 7th, 1877, but she is also the purchaser of the equity of redemption in respect of the share affected by that mortgage. The transfer of the equity of redemption by the auction-sale under which *Rampiyari* purchased was effected behind the backs of the present plaintiffs, and could not deprive them of the right of redemption which they possess as subsequent mortgagees. It was, however, an effective transfer *qua* the rights of the mortgagor, just as much as if the mortgagor had sold his equity of redemption to the prior mortgagee by a private sale behind the back of the subsequent mortgagees. I have no doubt, therefore, that the defendant-appellant, *Mt. Rampiyari*, has a right of redemption as against the plaintiffs respondents. In *Hassanbhai v. Umaji* (1), in a case strongly analogous to the present one, the High Court in second appeal passed a decree which had the effect of giving the prior mortgagee, who had acquired the equity of redemption, a first option of redeeming the subsequent mortgages, even while asserting the right of the subsequent mortgagees to redeem the prior mortgage, if the holder of the equity of redemption failed to redeem them. The difficulty I feel about passing a similar decree in the present case is in the main a practical one, arising out of the state of the pleadings and the evidence. It is true that, in the fourth and fifth paragraphs of

her written statement, *Mt. Rampiyari* did plead her rights as a purchaser of the equity of redemption. She went on to assert that the present suit had only been brought in order to anticipate a suit for redemption which she herself was about to institute against the present plaintiffs. She did not, however, proceed to claim any sort of alternative relief on the strength of these pleadings, apart from the dismissal of the plaintiffs' suit altogether. Something must have been said about the point in argument in the Court of first instance, for the learned Munsif fixed an issue in the following terms: "Can the plaintiffs or the defendant No. 1 get any relief in this case?" No evidence was led by either party to show the amount that would be due to the plaintiffs for the redemption of *Mt. Zaibunissa's* mortgage, beyond the fact that the sum actually paid to *Mt. Zaibunissa* by the plaintiffs-respondents was Rs. 1,000. Whether there were any costs of redemption which the plaintiffs would be entitled to add to this amount is not apparent from the record. Moreover, no question was raised in the Courts below, or has been gone into, as to whether the integrity of the mortgage in favour of *Mt. Zaibunissa* has been so broken up as to entitle *Mt. Rampiyari* to redeem a one-fourth share of the property affected by that mortgage on payment of one-fourth of the mortgage-debt. Some argument has been addressed to me on the questions of law involved; but I doubt whether the materials on the record are sufficient to enable me to decide them. A question of limitation might perhaps arise, in view of the fact that the plaintiffs paid off the whole of *Mt. Zaibunissa's* mortgage at a time when they only held a fractional share in the equity of redemption, and they would consequently become the holders of a charge in respect of the shares in the equity of redemption which do not belong to them, including, of course, the share of the mortgagor whose rights have been acquired by *Mt. Rampiyari*. Under all the circumstances, I do not think that the right of *Mt. Rampiyari*, as owner of the equity of redemption, to redeem from the plaintiffs-respondents, either the whole of the property covered by the mortgage of July 27th, 1887, or a one-fourth share in the same on payment of a proportionate fraction of the consideration, can properly or conveniently be

determined in the present suit. I, therefore, content myself, with dismissing the appeal and I do so accordingly with costs, including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 301

RICHARDS, C. J. AND BANERJI, J.

Chummun Prasad Choube and another
—Plaintiffs-Appellants

v.

Pranpat Choube and others—Defendants-Respondents.

First Appeals Nos. 377 and 407 of 1913, decided on 24th March, 1915, from the decision of the Sub-J., Gorakhpur, dated 10th May, 1913.

Hindu Law—Partition—Grand-mother entitled to share in partition between son and grandsons under Mitakshara.

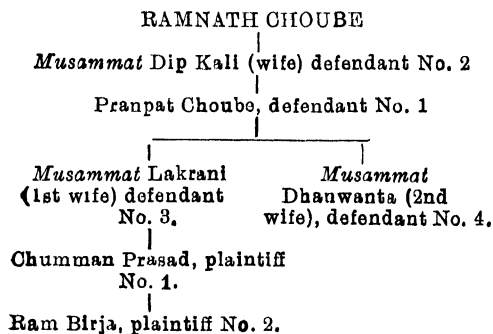
At a partition between a father and his sons, the grandmother is not entitled to a share under the *Mitakshara* Law. (16 I. C. 88, *Ref.*)

[P. 302, C. 1.]

Tej Bahadur Sapru and Iswar Saran—for Appellants.

Wallach and Jang Bahadur—for Respondents.

Facts :—The following geneological table shows the relationship of the parties:



Chumman Prasad, son, and Ram Birja Choube, grandson of Pranpat Choube, sued Pranpat Choube, his two wives and his widowed mother, *Mt. Dip Kali*, for partition of the family property. Among other pleas, the plaintiffs alleged that *Mt. Dip Kali* was the step-mother of Pranpat Choube and was not entitled to a share at the partition. The defendants contended, among other things, that *Mt. Dip Kali* was the mother of Pranpat Choube and was entitled to a

share at the partition. The Subordinate Judge held that she was the mother of Pranpat Choube, but she was not entitled to a share in the property. The Subordinate Judge's judgment being partly in favour of the plaintiffs and partly against them, both parties appealed to the High Court.

Judgment :—This and the connected Appeal No. 407 of 1913 arise out of a suit for partition, brought by the son and grandson of Pranpat Choube, defendant No. 1. The defendant No. 2 is the mother of defendant No. 1. Defendant No. 3 is the wife of defendant No. 1 and mother of plaintiff No. 1. The defendant No. 4 is, according to the plaintiffs, the mistress of defendant No. 1. According to the defendant No. 1 she is his lawful wife. The plaintiff's main objection to the decree of the Court below is that one-eighth of the estate which has been allotted to the minor plaintiff, has been placed in charge of the defendant No. 1. The case is really a very sad one. The family appears to have been quite prosperous, possessed of a considerable amount of immovable property and a good deal of produce of the land. The plaintiff No. 1 comes into Court alleging that his father (the defendant No. 1) is an immoral man, in that he is keeping defendant No. 4 as his mistress. The Court below has considered this question and has come to the conclusion that there is no truth whatever in the allegation. The defendant No. 1 himself went into the witness-box and proved that the defendant No. 4 was his married wife. This was an important admission. If she was a mere mistress, he could never hereafter deny that the lady was his wife. The lady appears to be of the same caste and a person whom he could legally marry. A number of witnesses were produced to prove the marriage, and the uncle of the lady deposed that he paid the expenses. The defendant No. 2, an old lady, proved that the marriage did take place. We entirely agree with the finding of the Court below that the defendant No. 4 is not the mistress but is the married wife of the defendant No. 1. It is an admitted fact that one Mohar Dat (the father-in-law of the plaintiff No. 1) was indebted to defendant No. 1 on a bond, that this bond was handed back by the plaintiff No. 1 to his father-in-law with an endorsement of payment. The Court has found in another suit that this was a dishonest transaction between

the plaintiff No. 1 and the father-in-law, and the latter was made responsible for the bond. Plaintiff No. 1 is at present about 23 years of age, and it seems pretty clear that the present suit is really brought at the instigation of Mohar Dat with the probable result that his son-in-law and his son-in-law's family will be ruined. Against the finding of the Court below of the legal right of plaintiff No. 1 to have partition, no exception can be taken and we are reluctantly constrained to hold that the plaintiff is entitled to a decree for partition. Under the circumstances we think that it would be most undesirable that his son's share should be placed in his charge. The son's share will, of course, remain in charge of defendant No. 1 who will hold it on behalf of the minor plaintiff.

In the connected appeal it is alleged first, that the plaintiff is not entitled to claim partition. As already stated this position cannot be supported. It is next said that *Mt. Dip Kali* is entitled to a share on partition. This is against the ruling in *Sheo Narain v. Janki Prasad* (1). It is lastly contended that one of the villages was purchased with money which belonged to *Mt. Dip Kali*. We entirely agree with the view taken by the Court below upon this point. The result is that both appeals fail.

We accordingly dismiss this appeal with costs including in this Court, fees on the higher scale.

Appeal dismissed.

(1) (1912) 16 I.C. 88=34 All. 505.

A. I. R. 1915 Allahabad 302

KNOX, J.

Ambika Pershad — Decree-holder-Appellant

v.

Salamat Khan—Judgment-debtor-Respondent.

Ex. Second Appeal No. 335 of 1915, decided on 18th May, 1915, from a decision of the District J., Azamgarh, dated 23rd December, 1914.

Civil P.C. (V of 1908), O.34, Rr. 7 and 8, payment before final decree redeems.

In a redemption suit the mortgagor decree-holder who fails to pay the redemption money

upto the date fixed for payment but pays it before the decree is made absolute, is entitled to redeem the property on such payment.
[P. 902, C. 2.]

Ishwar Saran and Parmeshwar Dayal —for Appellant.

Shafiuzzaman—for Respondent.

Judgment :—*Ambika Pershad*, the appellant, has obtained a decree against *Salamat Khan*, the respondent. This was based upon a compromise arrived at between the parties, according to which the appellant was entitled to redeem the property, if he paid Rs. 2-8. Regarding the payment of Rs. 2-8 the decree says in one place that it is to be paid on *Phagun Sudi purnamashi*. In another place it is said that Rs. 2-8 was to be paid at the time of obtaining possession. The date *Phagun Sudi purnamashi* had passed when the decree-holder came into Court with an application to execute the decree. He, however, brought Rs. 2-8 with him and prayed that they might be made over to the judgment-debtors. The Court accepted Rs. 2-8, but does not seem to have passed any definite orders about it. The Court of first instance, however, recognising that Rs. 2-8 had been paid before proceedings in execution commenced, granted the application. The judgment-debtors objected that the time for payment had passed and money could no longer be received and the application for execution should be dismissed. The Court of first instance did not accept this contention and allowed the proceeding to continue; but on appeal the learned District Judge set aside the Munsif's decision and ordered that the execution case should be dismissed. The case has come here in appeal and the contention is raised that inasmuch as the decree had not been made absolute, the appellant was entitled to redeem the property on payment of Rs. 2-8.

This plea appears to me to be a valid one and prevails. I set aside the order of the lower Appellate Court and direct that Court to replace this case upon its roll of pending appeals and to determine it according to law. Costs will follow the event.

Order set aside.

A.I.R. 1915 Allahabad 303.

CHAMIER AND PIGGOTT, JJ.

Bharath Chaube and others—Defendants-Appellants

v.

Gaya Chaube and others—Plaintiffs-Respondents.

Second Appeal No. 485 of 1913, decided on 14th May, 1915, from a decision of the Dist. J., Ghazipur, dated 15th January, 1913.

Registration Act (XVI of 1908), S. 17 (2) (b)—Compromise between decree holders in execution and acted upon requires no registration—Compromise is binding—Compromise.

(a) The joint-holders of a decree entered into a compromise among themselves as to the manner in which the decree should be executed and their petition of compromise was presented to the execution Court and acted upon.

Held, that the compromise did not require registration. [P. 304, C. 1.]

(b) *Held*, further, that the compromise was admissible in evidence and binding upon the parties by reason of the order to that effect, which was passed upon it, by the Court executing the decree. (*Case-Law Ref.*). [P. 304, C. 2.]

Bajpai—for Appellants.

Abdul Majid, Hamidullah Khan and Haribans Sahai—for Respondents.

Judgment :—This is a defendant's appeal in a suit for possession which arose out of certain previous litigation. There was a *zemindari* share of a 4 annas 8 pies belonging to one Harnam Singh. There were two incumbrances on this share, one was a mortgage of Rs. 931 in favour of the plaintiffs-respondents now before us. The other was a charge of Rs. 1,200 due on account of a premium lease in favour of the present defendants-appellants. Harnam Singh sold this share, and a suit for pre-emption was brought in which both parties to the appeal now before us appeared as joint plaintiffs. The result was that their right of pre-emption was decreed and it was held that a sum of Rs. 3,300 represented the sale price, apart from incumbrances. The Court, therefore, passed a decree for pre-emption of the entire share, jointly in favour of all the plaintiffs then before it, on payment of Rs. 1,169. In view of the fact that the incumbrances on the property were unequal in amount and different in nature, the pre-emption decree as passed was calculated to lead to difficulties in the execution department, and it is clear that it did so. One set of

plaintiffs, who are the plaintiffs-respondents now before us, paid into Court the entire sum of Rs. 1,169 and asked for possession. Objections were raised by the other set of plaintiffs, the defendants-appellants now before us, and eventually a petition of compromise was presented to the Court executing the pre-emption decree. That petition was to the effect that possession over a share of 2 annas 8 pies should be given to one set of plaintiffs (the respondents now before us), and over a share of 2 annas to the other set of plaintiffs, the appellants now before us. It was further provided that the payment of Rs. 1,169 should be treated as having been made on behalf of all the decree-holders, pre-emptors, and that the holders of the premium lease should give up their rights under the same. The order passed on this petition was that the parties should be considered bound by it and the decree executed accordingly. Unfortunately at a later stage the Court executing the pre-emption decree seems to have felt some difficulty about duly carrying out its own order. It had directed possession over a share of 2 annas 8 pies to be given to one set of plaintiffs, the present respondents. An objection was put in by the other set of plaintiffs (the present appellants) to the effect that, though proprietary possession might be given, the executing Court was not entitled to eject them from their possession as lessees. On this the Court said that all it was concerned with in executing the decree was to give proprietary possession to the parties in accordance with the terms of the compromise, and it passed orders accordingly. The present suit as brought by the plaintiffs-respondents was to recover possession of a share of 2 annas 8 pies. As it happened, the lease in favour of the opposite party covered a share of 4 annas 3 pies only, and it has been finally decided by the Courts below that the present plaintiffs are, as a matter of fact, in actual possession of a share of 5 pies and had no need to sue in respect of the same. The question, however, remains as to the claim of the plaintiffs to obtain actual possession over the share of 2 annas 3 pies, in respect of which the defendants-appellants are asserting their rights to continue in possession under the terms of their lease. The case went to trial in the Courts below on a number of issues all of which have been decided in favour of the plaintiffs. An important question of fact was whether the sum of Rs. 1,169

paid into Court by the present respondents actually came out of their pockets, or whether some portion of the same was contributed by the defendants-appellants. This point has been found in favour of the plaintiffs on the evidence, and if the finding is correct, there is certainly no equity in favour of the defendants-appellants. The one contention on behalf of the latter which we have to consider is as to the admissibility in evidence of the compromise filed in the execution Court. Undoubtedly that compromise has been admitted in evidence by the Courts below and has been made the basis of many of their findings. It has been contended before us that, if this document were ruled out as inadmissible, even the finding with regard to the payment of Rs. 1,169, though proceeding on the face of it upon other evidence, would require to be re-considered. We have been referred to a great deal of case law on the subject, which we do not propose to discuss in detail. The position of the parties before the execution Court was that of joint holders of a decree, which on the face of it merely entitled them to recover possession of a certain *zemindari* property on payment of a certain sum. The decree, as it stood with reference to the litigation out of which it arose, was an imperfect decree, and apart from the compromise entered into by the parties it is quite possible that the decree could not have been executed without an application to the Court which passed it to amend it or to bring it into conformity with the judgment. The joint decree-holders were undoubtedly entitled to enter into a compromise amongst themselves as to the manner in which that decree should be executed, and their petition of compromise presented to the execution Court did not as such require registration. It was a petition to a competent Court and in so far as it was submitted to and was acted upon judicially, it was undoubtedly binding upon the parties, vide *Bindesri Naik v. Ganga Saran Sahu* (1). The petition was so far acted upon that proprietary possession was given to the two sets of decree-holders in accordance with its terms. To this extent, at any rate, the document was admissible in evidence, and if it was admissible in evidence, it was not possible for the Courts to take into consideration one part of it and exclude another part. Moreover, we are

of opinion that, on the facts of this particular case, the question of the manner in which the joint decree holders were entitled to enjoy the fruits of their decree was so intimately connected with the question of the satisfaction or extinction of the charges which the two sets of decree holders severally held on the property, the subject matter of the decree, that the one question could not be dealt with without the other. We are, therefore, of opinion that this petition of compromise, although unregistered, was admissible in evidence and binding upon the parties, by reason of the order to that effect which was passed upon it by the Court executing the decree. In principle the case is closely analogous to a case decided by their Lordships of the Privy Council, *Mahomed Musa v. Aghore Kumar Ganguli* (2), and on principles of equity we have no doubt that these defendants-appellants ought to be held bound by the terms of the compromise, of which they have already taken advantage by obtaining proprietary possession over a share of 2-annas in respect of which they paid no money into Court. For these reasons we are of opinion that this appeal must fail, and we dismiss it accordingly with costs, including in this Court, fees on the higher scale.

Appeal dismissed.

(2) A.I.R. 1914 P. C. 27=42 Cal. 801=42 I. A. 1=28 I. C. 930 (P.C.).

A. I. R. 1915 Allahabad 304.

KNOX, J.

Bharat Duaj Damodar Das—Plaintiff-Appellant

v.

Mahabbat and others—Defendants-Respondents.

Second Appeal No. 612 of 1914, decided on 20th May, 1915, from a decision of the Addl. Dist. J., Etawah, dated 3rd March, 1914.

Jurisdiction—Appeal—Record Officer's order is not appealable to District Judge.

No appeal lies to the District Judge from an order of the Record Officer. [P. 805, C. 1.]

M. L. Agarwala—for Appellant.

Abdul Raoof—for Respondents.

Judgment :—The plaint in this case sets out that certain land is held by the

defendants as a *muafi* grant from the *zemindar*. The plaintiff says that he is no longer willing to allow the land to remain rent-free and he asks that a decree be passed for recovery of the *muafi* land. The plaint was instituted, as the description shows, in the Court of the Record Officer, District Etawah. The Record Officer heard the case and passed orders for resumption of the land and the ejectment of the defendants. The defendants went into appeal in the Court of the Additional District Judge, Etawah. That officer held that the plaintiff had failed to prove that the grant was a resumable grant at the pleasure of the grantor; further, that the defendants had acquired proprietary rights therein.

The plaintiff comes in appeal here and says that no appeal lay to this District Judge from the order of the Record Officer. This plea appears to be a good plea and must prevail. The appeal is decreed, but the memorandum of appeal to the lower Appellate Court will be sent back to that Court for return to Mahabbat and others, if they apply to the same, in order to be presented to the Court having jurisdiction.

Appeal decreed.

A. I. R. 1915 Allahabad 305

CHAMBER AND PIGGOTT, JJ.

Kashi Nath and another—Decree-holders-Appellants

v.

Kanhaiya Lal Sharma—Receiver-Respondent.

First Appeal No. 34 of 1915, decided on 10th May, 1915, from the order of the 2nd Addl. J., Aligarh.

Provincial Insolvency Act (III of 1907), S. 34—Scope of—Creditors are in same position whether they have attached property or not—Attaching creditor cannot sell property after adjudication.

Section 34 of the Provincial Insolvency Act was intended to put creditors of an insolvent, who have not actually attached the property before the date of the order of adjudication in at least as good a position as creditors of the insolvent who, but for his insolvency, would have been entitled to claim a rateable distribution of the assets received on an execution sale.

[P. 306, C. 1]

A creditor instituted a suit against his debtor and attached his property before judgment. Subsequently the debtor was adjudicated insolvent. After the order of adjudication, the creditor who had attached the property proceeded to sell the property in execution of his decree. The Receiver objected and claimed the property for the general body of creditors.

Held, that the property not having been sold before adjudication was still the property of his insolvent and as such was available to the general body of creditors. [P. 306, C. 1]

Abdul Raoof—for Appellants.

Pearey Lal Banerji—for Respondent.

Judgment :—This is an appeal against an order of the Second Additional Judge of Aligarh, passed under the Provincial Insolvency Act. In June 1909, the appellants filed a suit against Keshab Deo and others and they caused certain immovable property of Keshab Deo to be attached under O. XXXVIII of the Code of Civil Procedure before judgment. The appellants obtained a decree in that suit on June 12th, 1913. In the meantime Keshab Deo had transferred portions of the property by four sale deeds, dated November 15th and 16th and December 6th and 9th, 1909, and part of the property which had been attached had been sold in 1909 in execution of a decree passed by the Bombay High Court. Keshab Deo had, in 1911, been declared insolvent and the respondent, Pandit Kanhaiya Lal Sharma, had been appointed Receiver of his property. The Receiver has claimed the property in question as property which is available for the creditors of the insolvent, and the learned Judge has decided that it is property available for the creditors, and has directed the Subordinate Judge who placed the property under attachment to release it from the attachment and make it over to the Receiver. It appears that execution of the decree obtained by the appellants was taken out by them in 1914, the property was proclaimed for sale and the sale was to have taken place on January 22nd last. It was at this point that the Receiver claimed the property on behalf of the general body of creditors. Under S. 64 of the Code of Civil Procedure neither private alienations made by Keshab Deo, nor the execution sale of the property could affect the rights of the appellants to bring the property to sale in execution of their decree. The appellants' case is that the property has under the private alienations and the execution sale ceased to be the property of Keshab Deo, and that all that the appellants have is the special right conferred upon them by S. 64 of the Code of Civil Procedure to execute their decree against the property, notwithstanding the private alienations and the execution sale. They contend

that the property is no longer the property of Keshab Deo and, therefore, S. 34 of the Provincial Insolvency Act does not apply so as to entitle the Receiver to claim it. It may be that the private alienations and also the execution sale of the property are void as against the Receiver, and if so, there can, of course, be no doubt that the property is the property of Keshab Deo and S. 34 must be held to be applicable. Assuming, however, that the private alienations and the execution sale are not voidable or void as against the Receiver, we think that the property must still be regarded as the property of the debtor, Keshab Deo. The decree-holders are entitled to bring the property to sale as the property of Keshab Deo because the private alienations and execution sale are void as against them. Section 34 of the Provincial Insolvency Act provides that where execution of a decree is issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realized in the course of execution by sale or otherwise before the date of the order of adjudication. The sale has not yet taken place, but execution of the appellants' decree has issued against the property. In our opinion the property must still be regarded as the property of the debtor, and it is as property of the debtor that it is liable to answer the decree held by the appellants. It seems to us quite clear that S. 34 of the Provincial Insolvency Act was intended to put creditors of an insolvent who have not actually attached the property before the date of the order of adjudication in at least as good a position as creditors of the insolvent who, but for his insolvency, would have been entitled to claim a rateable distribution of the assets received on an execution sale. In our opinion the learned Judge was right in holding that the property was available for the general body of creditors. But we express no opinion as to the rights of the alienees or of the purchasers at the execution sale, as they are not before us. The appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 306

PIGGOTT, J.

Pachkauri Raut and another—Defendants-Appellants

v.

Ram Khelawan Chaube—Plaintiff-Respondent.

Second Appeal No. 922 of 1914, decided on 10th June, 1915, from the decision of the Addl. Dist. J., Gorakhpur, dated 16th March, 1914.

Hindu Law—Alienation by father of joint ancestral property without legal necessity is not binding on sons. (Quaere)—Whether attestation denoted consent.

P and his two sons G and R constituted a joint Hindu family, G being major and R minor. P alienated joint family property and the sale-deed was attested by G. In a suit by R to set aside the alienation :

Held, that there being no legal necessity for the sale, the son could contest the alienation and that though the powers of a Hindu father as manager of a joint family were extensive, they did not extend to the alienation of joint ancestral family property otherwise than for legal necessity. [P. 307, C. 1]

It was doubtful whether consent could rightly be inferred from mere attestation in the absence of other evidence. [P. 307, C. 1]

Jawahir Lal Nerhu and Shyam Nath Mushran—for Appellants.

Parmeshor Dayal and Iswar Saran—for Respondent.

Judgment :—This was a suit by a Hindu son to contest an alienation made by his father during the minority of the plaintiff. It appears that there was a joint family consisting of Ganesh Prasad and his two sons, Gajadhar Prasad and Ram Khelawan. On 30th June, 1905, Gajadhar Prasad being at the time a major and Ram Khelawan a minor, their father, Ganesh Prasad, executed a deed of sale purporting to convey a 6 pies share in certain *zemin-dari* property to Musammatt Ram Kali, the predecessor-in-title of the defendants-appellants. The share thus conveyed was part of the ancestral property of the joint undivided family consisting of Ganesh Prasad and his two sons. The deed of sale was signed by Gajadhar Prasad as an attesting witness. The latter did not, however, join in executing the deed, which is and purports to be a conveyance by Ganesh Prasad alone. Both the Courts below have held that the plaintiff, Ram Khelawan, is entitled to contest the alienation, the finding being that there was

no legal necessity for the sale. In second appeal to this Court it is contended that this was an alienation by a manager of a joint Hindu family acting as such and that all the members of the family are bound by the sale. The powers of a Hindu father as manager of a joint family are extensive; but they do not extend to the alienation of joint ancestral family property otherwise than for legal necessity. Those cases of this Court in which it has been held that in certain suits the whole of the joint Hindu family may be effectively represented by the *karta* or manager of the same have no bearing on the point now in question and in no way affect the correctness of the principle above stated.

In the second place, the appellants ask the Court to treat the sale in question as an alienation by all the adult members of the joint family and, therefore, binding upon the plaintiff, Ram Khelawan, who was at the time a minor member of the said family. To this it is a sufficient answer that the alienation purports to be by Ganesh Prasad alone, that Gajadhar Prasad does not join in making the same and that his mere attestation of the sale-deed can have no effect upon the plaintiff's rights. A further plea has been added to the effect that the sale should not have been set aside without a declaration that the purchase-money is binding as a charge on the share of Gajadhar Prasad whose attestation of the sale-deed makes him, it is contended, a consenting party to the sale. I should have been inclined to doubt, if I had to determine this question as against Gajadhar Prasad, whether consent could rightly be inferred from mere attestation in the absence of the evidence; but the question does not arise, in view of the fact that the defendants-appellants have not made Gajadhar Prasad a party to this appeal. The plaintiff, Ram Khelawan, very properly impleaded Gajadhar Prasad along with the successors-in-title of the vendee. When the suit had been decreed by the Court of first instance and the vendees' successors carried the matter in appeal to the District Judge, they did not make Gajadhar Prasad a party to their appeal. What they really contended for in the lower Appellate Court was a finding that there was legal necessity for the transfer, in that the consideration had gone towards paying off antecedent debts incurred by the vendor, Ganesh Prasad. If this could

have been established the plaintiff could, of course, have been bound by the alienation. The finding of both the Courts below has been in favour of the plaintiff on this point. I do not find any force in the legal pleas now taken before this Court and I dismiss this appeal with costs, including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 307

BANERJI AND RAFIQUE, JJ.

Hargu Lal and others—Plaintiffs-Appellants

v.

Med Singh and others—Defendants-Respondents.

Second Appeal No. 342 of 1915, decided on 18th May, 1915, from a decision of the Addl. Dist. J., Meerut, dated 12th December, 1913.

Agra Tenancy Act (II of 1901). S. 210—Plaintiff in suit for profits is not entitled to presumption under S. 201 if revenue papers corrected subsequently in accordance with prior decision of Civil Court.

A recorded co-sharer in a village was declared by a Civil Court to have no title as such. Pending an application for correction of the Revenue Records in conformity with the Civil Court's declaration he sued for profits as a co-sharer but before this suit was decided the Revenue papers were corrected and his name was expunged:

Held, that under the circumstances, he could not take advantage of the presumption of S. 201 of the Agra Tenancy Act. [P. 305, C. 1.]

M. L. Agarwala—for Appellants.

Tej Bahadur Sapru—for Respondents.

Judgment :—This appeal arises out of a suit brought by the plaintiffs-appellants for their share of profits for the year 1318 and 1319. It appears that during these years the plaintiffs were recorded as co-sharers, but before the institution of this suit a suit had been brought in the Civil Court which decided that the plaintiffs had no title and that they were not co-sharers although they were recorded as such. In accordance with the decision of the Civil Court an application was made for the correction of the entry in the Revenue papers and for the removal of the names of the plaintiffs from the list of co-sharers. It was during the pendency of this application that the present suit was brought. Both the Courts below have dismissed the suit and in our opinion

rightly. The learned Counsel for the appellants relies upon S. 201 of the Agra Tenancy Act and contends that as at the date of the suit the plaintiffs were recorded as co-sharers, there was a presumption in their favour under the section that they were co-sharers and were entitled to profits. He also relies on the decision of the Full Bench in *Durga Prashad v. Hazari Singh* (1). In our opinion this case is clearly met by the observations made by the learned Chief Justice in his judgment in the Full Bench case referred to above. At page 807 of the report he says: "In very extreme cases where it is clear that there has been some mistake in the record, it would, I think, be open to the Revenue Court to postpone the decision of the case to give the defendant an opportunity of making an application in the Revenue Court to have the entry corrected." In this case as we have said above, an application had already been made for the correction of the entry. A Civil Court had already decided in favour of the defendants and against the plaintiff's title and before the case was decided, the entry of the names of the plaintiffs in the Revenue papers was corrected and their names were expunged. Therefore, it seems to us that this is not a case in which the plaintiffs can claim the presumption of S. 201 of the Tenancy Act. Under that section, if effect was given to the presumption, the defendants' remedy would be to bring a suit in the Civil Court. In the present instance, a suit had already been brought and a decree obtained negating the plaintiffs' title. Their names were expunged before the decree in the suit was passed. Therefore, S. 201 would be of no avail to the plaintiffs. We might point out that in the case of *Bhawani Singh v. Dilawar Khan* (2), it was held that when as between the parties to a Revenue suit, a Civil Court of competent jurisdiction has decided the title to the property adversely to the plaintiff who claims profits, the Revenue Court is not competent to ignore that decision. This ruling also governs the present case. We accordingly dismiss the appeal with costs, including fees on the higher scale.

Appeal dismissed.

A. I. R. 1915 Allahabad 308.

PIGGOTT, J.

Nand Kishore—Petitioner

v.

Suraj Mal and others—Opposite Parties.

Civil Revn. Petn. No. 13 of 1915, decided on 26th April, 1915, from the Order of Dist. J., Cawnpore.

Provincial Insolvency Act (III of 1907), S. 43—Receiver's report is not admissible in evidence in prosecution under S. 43—Evidence Act (I of 1874), S. 35.

The report of a Receiver of an insolvent's property to the effect that the insolvent had fraudulently transferred his property to his wife before declaration of insolvency, is not admissible in evidence to convict the insolvent under S. 43 of the Insolvency Act. (*Case-Law Ref.*).

[L. 308, C. 2.]

W. Wallack and A. P. Dube—for Petitioner.

B. E. O'Connor—for Opposite Parties.

Judgment:—In this case an appellate order by the District Judge of Cawnpore has been called up by this Court in the exercise of the general powers of superintendence and revision conferred upon it by S. 46, Cl. (1), of the Provincial Insolvency Act, III of 1907. The order is one sentencing an insolvent named Nand Kishore to undergo simple imprisonment for a period of six months under S. 43 of the said Act. The allegations held to be proved against him are:—

(1) That in the year 1903 at a time when the business which he was conducting was beginning to fail, he fraudulently transferred certain property by way of gift to his wife and other members of his family, (2) that in the schedule of assets submitted by him along with his application to be declared an insolvent he fraudulently concealed the existence of the property nominally transferred by him and also the fact that he was the owner of a shop in what is known as the Kuli Bazar at Cawnpore. Nand Kishore's case was that the transfer by way of gift was made in good faith, and that the shop in the Kuli Bazar has never been his property. The finding against Nand Kishore, both in the Court of first instance and in the District Court, has been mainly based upon certain reports submitted by the Receiver. I hold that those reports do not constitute legal evidence for the purpose for which they have been used and should not have been taken into account against Nand

(1) (1911) 11 I.C. 116=33 All. 799 (F.B.).

(2) (1909) 1 I.C. 886=31 All. 253 (F.B.).

Kishore. The learned District Judge has referred to the decision of a Full Bench of this Court, in a case reported under the heading *Chiranjil Lal v. Emperor* (1). Somewhat more in point was the earlier decision of a Bench of this Court in *Nathumal v. District Judge of Benares* (2). Neither of these precisely touch the question which has been argued before me, but there can be no doubt that an order sentencing an insolvent to undergo imprisonment must be based upon legal evidence and the depositions of witnesses whom he had an opportunity of cross-examining. The report of a Receiver may be evidence for the special purpose of determining whether an insolvent is or is not entitled to an order of discharge, *vide* S. 44 of the Act. It may also be taken into consideration by Court for a certain other purposes, as for instance, when considering the admissibility of a proposal for composition under S. 27 of the same Act. It is not evidence for the purpose of all possible proceedings under the Act. I have examined the facts of the present case, and I am quite satisfied that there are a number of points on which the Receiver might well have been cross-examined, and on which Nand Kishore was fully entitled to an opportunity of cross-examining, before the statements of fact embodied in his report could be accepted and acted upon as they have been done in the Courts below. I do not gather from the record that either the property purporting to be transferred under the deed of gift of 1908 or the shop in the Kuli Bazar has been taken possession of by the Receiver as part of the assets of the insolvent, or made available for the satisfaction of the creditors. The learned Judge of the Small Cause Court who heard this case in the first instance would not, I am confident, have dispossessed any person whom he found in possession of this shop on the strength of the evidence which, in his opinion, justified the infliction upon Nand Kishore of a sentence of imprisonment. Yet it is a more serious matter to sentence a man to undergo imprisonment than to deprive another of his possession over a building. In the argument addressed to me in support of the order of the District Judge, reference was made to an English case *Campbell, Ex-*

parte, Wallace, In re (3). That case really bears out the view which I take of the present case. Certain reports submitted by a Receiver were allowed to be taken into consideration in that case precisely as they could have been under S. 27 of the Provincial Insolvency Act, III of 1907. But the case is no authority for the proposition that such reports could have been treated as evidence in a proceeding the object of which was to subject an insolvent to the penal provisions of the Insolvency Act. I am unable to sustain the order of the District Court in this matter, and the only question that I have to consider is what order I should substitute for it. On a review of the entire facts of the case, I am not prepared to direct that further proceedings should be taken in this matter. I have already affirmed an order of the Court below refusing Nand Kishore his discharge, and it is possible that proceedings involving further inquiry into the matters litigated in connection with the order now before me may yet have to be taken. If it be found hereafter that evidence is forthcoming such as to justify the Insolvency Court in taking possession either of the shop in the Kuli Bazar or of the property purporting to be dealt with by the deed of gift of 1908, as assets belonging to Nand Kishore at the time when he was declared insolvent, and, therefore, available for the satisfaction of his creditors, it may be that the question of subjecting Nand Kishore to punishment for his dealings in this connection may require further consideration. Unless and until something of the sort occurs, I am not of opinion that the facts which were before the Courts below were such as to justify the application of S. 43 of the Provincial Insolvency Act in this case. My order is that the order of the Court below is set aside and that the security which I understand Nand Kishore has furnished for his attendance, if required, is heroby discharged. I make no order as to costs.

Conviction set aside.

(1) A.I.R. 1914 All. 276=20 All. 576=25 I. C. 986.

(2) (1910) 6 I. C. 807=32 All. 547=7 A. L. J. 602.

(3) (1885) 15 Q.B.D. 213=54 L. J. Q. B. 382=58 L.T. 208=2 Morrell, 167.

A. I. R. 1915 Allahabad 310 (1).

BANERJI, J.

Bishunath Shukul—Defendant-Appellant

v.

Ganesh Datt Shukul—Plaintiff-Respondent.

Second Appeal No. 900 of 1914, decided on 23rd April, 1915, from a decree of the Addl. J., Gorakhpur.

Easement Act (V of 1882), S. 23—Court has power to direct opening of another channel in place of one blocked.

Where the defendant had blocked a water channel of the plaintiff by building a wall.

Held, that the Court had power to direct the opening of another channel through the defendant's land without demolishing the wall.

[P. 310, O. 1.]

Muhammad Ishaq Khan—for Appellant.

Narmadeshwar Upadhyaya—for *Kalindi Prosan*—for Respondent.

Judgment :—This and the connected Appeal No. 620 of 1914 arise out of two suits brought one by Ganesh Datt Shukul and the other by Jadunandan Shukul for establishment of the right of each of them to carry water into their fields by means of a channel which runs through the defendant's field No. 32/1. The field of Ganesh is No. 31 and that of Jadunandan is No. 32/2. It was alleged that the plaintiffs had a right to irrigate their fields with water flowing through the channel and that the defendant had blocked this passage by building a wall. The defence was that the fields of the two plaintiffs were irrigated with water flowing through the fields Nos. 40 and 41 and 29 and 33. This has been found against the defendant and the Court below has held that as a matter of fact the fields of the two plaintiffs were irrigated with water flowing through the channel which existed in the defendant's field No. 32/1. This is a finding of fact and must be accepted in second appeal. The learned Judge, instead of directing the house built by the defendant to be demolished or that the channel should flow through the house, has directed that from the point *G* noted on the map the defendant should open a passage for the flow of water through his field to enable the plaintiffs to irrigate their fields. This, it seems to me, is a very reasonable view to take of the case. The appellant, however, contends that the right of easement claimed by the plaintiffs had not been used for more than two years before

the institution of the suit and that their right had thus become extinct. It was alleged in the plaint that the obstructions made by the defendant which blocked the passage of water were made in *Asarh* and *Kartick* 1319, that is in 1912. Both the Courts below have found that the constructions are new. The defendant himself did not assert that they were more than two years old. So that I must take the Court below to find that the right of easement had been enjoyed within two years prior to the institution of the suit. The appeal fails and is dismissed with costs.

*Appeal dismissed.***A. I. R. 1915 Allahabad 310⁽²⁾.**

TUDBALL AND RAFIQUE, JJ.

Gati—Plaintiff-Appellant

v.

Rachla Kunwar and another—Defendants-Respondents.

First Appeal No 102 of 1914, decided on 12th May, 1915, from the decree of Offg. Sub-J., Gazipur.

Civil P. C. (V of 1908), O. 44, R. 1—Appeal on deficient stamp filed after 30 days—Prayer to treat as application under O 44, R 1 was held barred by time—Limitation Act (IX of 1908), Art. 170.

An appeal was filed in the High Court long after 30 days had expired from the decision of the Court below. On the report of the office as to the deficiency of the Court-fees, the appellant expressed his inability to pay the Court-fee and asked the Court to take the appeal *in forma pauperis*.

Held, that the appeal having been filed beyond 30 days of the decision of the Court below could not be treated as an application for leave to appeal *in forma pauperis* and was barred by limitation. [P. 311, C. 1.]

Girdharilal Agarwala—for Appellant.*Abdul Raoof*—for Respondents.

Judgment :—The decision of the Court below, against which the present appeal has been preferred, was passed on the 29th of March, 1913. On the 30th June, 1913, the present appeal was filed. The appellant put upon his petition of appeal a Court-fee of Rs. 10. The office reported that there was a considerable deficiency in Court-fees, that the proper fee ought to have been Rs. 475 and that there was a corresponding deficiency in the Court below. The appellant asked for time to make good the deficiency. Time was

given to him on several occasions, but he failed to make good the deficiency. Finally on the 17th of January, 1914, he filed a petition alleging that he was a pauper, that he was unable to make good the deficiency, that his regular appeal, which was presented within time *as such*, might be continued as a pauper appeal under O. XLIV of the Code of Civil Procedure and might be proceeded with according to law. His petition was granted by an *ex parte* order of the 24th March, 1914. Now it is clear that if the petition of appeal be treated as a petition for leave to appeal *in forma pauperis*, it ought to have been filed within 30 days of the decision of the Court below under Art. 170 of the Limitation Act. The order of this Court passed on the 24th March, 1914, being an *ex parte* order, is open to objection at the hearing of the appeal and this objection has now been raised, that the appeal as an appeal *in forma pauperis* is barred by time. There can be no doubt that it is barred. It having been presented more than three months after the decision of the Court below. On behalf of the appellant we are assured that he cannot pay the deficiency in Court-fees. It is impossible to treat the appeal as an ordinary appeal. Time was repeatedly allowed to the appellant to make good the deficiency, but he has failed to make it good. As an appeal *in forma pauperis* the present appeal is barred by time. We, therefore, dismiss it with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 311.

CHAMIER, J.

Amir Singh — Judgment-debtor-Appellant

v.

Chattar Singh and another—Decree-holders-Respondents.

Ex. Second Appeal No. 1739 of 1914, decided on 23rd April, 1915, from the decision of the Dist. J., Meerut, dated 24th June, 1914.

(a) *Civil P. C. (V of 1908), O. 21, R. 2—Uncertified payment cannot be recognized for any purpose.*

An uncertified payment under a decree cannot be recognized for any purpose under the new Code of Civil Procedure, by the Court executing the decree. [P. 311, C. 2.]

(b) *Limitation Act (IX of 1908), Art. 182 (7)—Uncertified payments of decree cannot extend period—Application must be within 3 years of default.*

Where a decree provides for payment of the money due under it in instalments and in case of default in payment of any of the instalments, the whole amount becomes payable at once, an application for execution should be made within three years of the first default.

[P. 311, C. 2 & P. 312, C. 1.]

Mohan Lal Sandal—for Appellant.

Gokul Prasad—for Respondents.

Judgment :—This appeal arises out of an application made on November 12th, 1913, for execution of a decree dated May the 10th, 1909. The decree was for a considerable sum of money to be paid in certain instalments. The first instalment amounting to Rs. 124 was to be paid at the end of *Aghan Sambat*, 1966 corresponding with December the 26th, 1909. The second instalment amounting to Rs. 62 was to be paid at the end of *Jeth Sambat* 1967. Subsequent instalments of Rs. 62 each were to be paid at the end of *Aghan* and at the end of *Jeth* till the whole decree was satisfied. In case of default the whole amount became payable at once. The decree-holders in their application of November 12th, 1913, stated that they had received the first four instalments, but that there had been a default in payment of the instalment due at the end of *Aghan Sambat* 1968, and they, therefore, claimed the whole amount remaining due under the decree. Payment of the first 4 instalments was not certified to the Court or recorded by the Court and, therefore, cannot be recognized by any Court executing the decree. The learned Vakil for the decree-holders relies upon a decision of this Court based upon S. 258 of the Civil Procedure Code of 1882, but the words relied upon by this Court as justifying the view that a Court might recognize an uncertified payment for some purposes, have now disappeared from the Code with the result that an uncertified payment cannot be recognised for any purpose, certainly not for the purpose of saving limitation. The decree in question provides in plain terms that if there is default in payment of any instalment, the whole amount of the decree shall become payable. It has been held in a large number of cases that Cl. (7) in the 3rd column of Art. 182 of Sch. I to the Limitation Act applies to such a provision as this. The only point on which there is any room for doubt is whether the decree directed payment to be made on a certain date. The decree directs that instalments are to be paid on or before the last day of *Aghan* and *Jeth*, and that if

there is default, the whole amount shall become payable at once. This appears to me to bring the case within Cl. (7), and I hold that the application for execution should have been made within three years of the 1st default. The decree-holders being unable to prove that any instalments have been paid, I must take it that the first default occurred at the end of *Aghan Sambat* 1966. Therefore, the present application for execution, made more than three years after that time, is barred by limitation and should have been dismissed. I was referred to a judgment of the Bombay High Court in a case in which the effect of subsequent payment and acceptance of overdue instalments was discussed. It appears to have no bearing on the present case, as it is not suggested that there was acceptance of an overdue instalment or anything in the shape of waiver which would affect a period prescribed by the Limitation Act. I allow this appeal, set aside the order of the Court below and dismiss the respondents' application for execution with costs throughout. Costs in this Court will include fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 312.

BANERJI, J.

Padarath Tewari—Plaintiff-Appellant

v.

Baz Singh and others—Defendants-Respondents.

Second Appeal No. 271 of 1914, decided on 26th April, 1915, from the decision of the Dist. J., Benares, dated 12th November, 1913.

Landlord and tenant—Zamindar cannot eject tenant if he builds house on site in his possession for agricultural purposes—No adverse possession.

Where a tenant is in possession of a *parti* land at a short distance from the site of his house for the purposes of keeping his cattle troughs, cattle-shed and sugar-cane press, the presumption is that the land was given to him for purposes ancillary to agriculture, and if he builds a house on the land for the stalling of cattle and storing of the implements of husbandry, the *zamindar* cannot get the house demolished so long as he remains a tenant. [P. 312, C. 2.]

No question of adverse possession arises in such a case. [P. 312, C. 2.]

Harnandan Prasad—for Appellant.

Harendra Krishna Mukerjee—for Respondents.

Judgment :—The plaintiff, who is one of the co-sharers in the village, brought the suit out of which this appeal has arisen for demolition of certain constructions made by the defendants on *parti* land. The defendants contended that they had been in possession of this land for a long time, that they had their cattle troughs, sugar-pressing mill and a shed for storing sugar-cane juice and keeping cattle on the land and that they had re built the shed which they had there. The Court of first instance found in favour of the defendants and dismissed the suit, and this decree has been affirmed by the lower Appellate Court. In my judgment on the findings of both the Courts below, the decision of the lower Appellate Court is right. It has been found that the house of the defendants, who are tenants in the village, is at a short distance from the site in dispute, that they have been in possession of this site for upwards of 12 years and have had their cattle troughs, cattle-shed and sugar-cane press there, and that all that they have now done is to build a house for the stalling of cattle and storing of the implements of husbandry. The learned Judge from all these circumstances drew the inference that the land had been given to the defendants as a part of their holding, and that they were entitled to occupy the land so long as their holding existed. In my opinion, the inference which the learned Judge drew from the facts is a reasonable inference. Where a tenant has been in possession of a piece of land for purposes ancillary to the purposes of his agricultural holding, the fair presumption is that the land was given to him for the purposes last mentioned. There was no question of adverse possession in this case. Under the circumstances found, the plaintiff was not entitled to eject the defendants from the land in suit and his suit was rightly dismissed. I dismiss the appeal with costs.

Appeal dismissed.

A.I.R. 1915 Allahabad 313.

PIGGOTT, J.

Ram Narain — Judgment-debtor-Appellant

v.

Govind Pershad—Decree-holder-Respondent.

Ex. First Appeal No. 323 of 1914, decided on 3rd May, 1915, from the decision of the Addl. Sub-J., Cawnpore, dated 28th February, 1914.

Civil P. C. (V of 1908), S. 34 and O. 34, R. 8 — Effect of extension of time by appellate Court in redemption entitles mortgagee to interest for further period.

In a redemption suit a certain date was fixed in the decree for payment of the money and it was provided that up to that date the mortgagor would pay interest at the contractual rate. The plaintiff appealed to the High Court. The High Court confirmed the decision of the Court below and, extending the period for payment of the money, fixed another date.

Held, that the effect of the extension of time by the appellate Court was to substitute the date fixed by that Court for that fixed by the first Court, and that the mortgagee was entitled to interest at the contract rate up to the date fixed by the appellate Court. [P. 314, C. 1.]

Moti Lal Nehru—for Appellant.*R. K. Malaviya*—for Respondent.

Judgment :—This is an execution first appeal, and the question raised by it is as to the interpretation of a conditional decree for redemption, dated the 13th of January, 1908, and the effect of an order and decree of this Court, dated August 1st, 1910, disposing of an appeal from the said decree. It is necessary, first of all, to be quite sure what interpretation it would have been necessary to put on the decree of the first Court if it had never been modified in any way by this Court. The suit was for redemption of four mortgages and the mortgagee was in possession of the property. He was entitled under the terms of his mortgages to compound interest at Re. 1 per cent. per mensem, with six monthly rests, but was also liable to account for the profits of the mortgaged property in his hands. A reference to the judgment of the first Court makes it clear that the intention of that Court was simply to give effect to the mutual rights and liabilities of the parties under their contract of mortgage up to the 13th of June, 1908, the date fixed for payment. The decree was un-

fortunately worded. In referring to the profits of the mortgagee in possession the words used in the decree were as follows:—
“The defendant shall be entitled to get any further sums that may be found due to him with reference to the actual realizations up to the date of payment, together with interest at the contractual rate at Re. 1 per cent. per mensem.” I must lay stress on the fact, that these words, as they stand, are scarcely susceptible of any reasonable interpretation. Either the word “defendant” has been used by an oversight for the word “plaintiff”, or the words “entitled to get” have been used when the Court intended to say “liable to account for.” It is because of the ambiguous and unsatisfactory wording of this paragraph of the decree that I felt justified in referring to the operative portion of the judgment in order to arrive at the mind of the Court. Reading the decree and the judgment together, I have no real doubt as to what the first Court intended to do, and must be understood to have done. The date fixed for payment was the 13th of June, 1908. Up to that date the defendant-mortgagee was to be entitled to receive interest at the contractual rate, namely, one per cent. per mensem, compound interest, with six-monthly rests, but on the other hand, he was to be liable to account for profits received by him by virtue of his possession over the mortgaged property, these profits being deducted from interest. After the 13th June, 1908, in place of the right to receive the contract rate of interest and liability to account for the profits received, the Court allowed the defendant-mortgagee simple interest at eight annas per cent. per mensem. I have no doubt that the Court of first instance did not intend that either the right to receive interest at the contract rate, or the liability to render account for rents or profits, should continue beyond the 13th June, 1908, nor do I find anything in the decree which, in my opinion, requires to be interpreted as extending either this right or this liability beyond the date fixed for payment. Now comes the other question, as to the effect of this Court’s decree of August 1st, 1910. The appeal before this Court was by the plaintiffs-mortgagors. That appeal was dismissed and the decree of the first Court affirmed; but the time for payment was extended to a period of six months from the date of this Court’s decree, that is to say, to the 1st of February, 1911. In my

opinion the effect of this extension must be considered to be a substitution of this date, namely, the 1st of February, 1911, for the 19th June, 1908 in the decree of the first Court. The defendant-mortgagee will be entitled to interest at the contract rate upto the extended date thus fixed for payment and will be liable to account for the profits received and enjoyed by him up to that date. Beyond that period his right and liability will both cease, and in lieu of either he will retain the right to receive simple interest at eight annas per cent. per mensem. This is the principle on which the Court below has proceeded in preparing the decree absolute for sale, which has followed on the failure of the plaintiffs-mortgagors to avail themselves of the opportunity to redeem the property within the period fixed. The appeal, therefore, fails and is dismissed with costs, including fees on the higher scale. For the purpose of proper calculation of fees the appeal will be valued at Rs. 7,000.

Appeal dismissed.

A. I R. 1915 Allahabad 314.

PIGGOTT, J.

Amir Shah and others—Plaintiffs-Appellants

v.

Tula Pande and others—Defendants-Respondents.

Second Appeal No. 665 of 1914, decided on 27th April, 1915, from the decision of the Sub-J., Ghazipur, dated 25th February, 1914.

Limitation Act (IX of 1908), S. 10 and Art. 134—Suit for possession against mortgagee of endowed property from trustee if in possession for 12 years before Act (IX of 1871) on ground of mortgage being void, is barred.

A suit for possession of an endowed property against a person who has been holding it as a mortgagee from the trustees of the property for over 12 years, prior to the coming into force of the Limitation Act, IX of 1871, on the ground that the alienation was null and void, is barred by limitation. (31 Cal. 314, *Foll.* and 20 All. 482, *Ref.*). [P. 316, C. 1.]

Muhammad Ishaq Khan—for Appellants.

Lakshmi Narayan—for Respondents.

Facts:—The plaintiffs, alleging themselves to be trustees of a certain shrine, brought a suit for cancellation of two

mortgages executed by a former-mutwalli on *Jeth Suli* 10th, 1260 *Fasli* and *Mugh Sudi* 2nd, 1265 *Fasli* respectively, and for possession on the ground that the property mortgaged was *wagf* property. The main plea in defence was that the suit was barred by limitation. The Court of first instance held in favour of the plaintiff and found that the mortgages were without consideration and, therefore, S. 10 read with Article 134 of the Limitation Act applied. On appeal the lower Appellate Court dismissed the suit, on the ground that the time began to run against the trustees when the mortgagee took possession of the property. It relied on *Behari Lal v. Muhammad Muttuk* (1). The plaintiffs appealed.

Judgment:—The question raised by this second appeal is whether the lower Appellate Court was justified in dismissing the suit brought by the plaintiffs-appellants now before me, on the ground that it was barred by limitation: stated somewhat more strictly, the precise point is whether the lower Appellate Court was justified in so dismissing the suit, without formally recording a certain finding of fact which, it is contended, has not been recorded. The plaint as filed was somewhat curiously drafted. The land in suit was stated to be revenue-free land appertaining to a certain *wagf* created in favour of a shrine, known as the shrine of Hazrat Shah Nandpir in the Ghazipur District. The plaintiffs claimed to be the trustees of the said shrine. They impleaded three defendants, though the allegations in their plaint are entirely directed against Tula Pande, defendant No. 1. There is no explanation of the appearance of the defendants Nos. 2 and 3 on the record, beyond the remark that they have been impleaded as *pro forma* defendants. I may add that they are not impleaded in the 2nd appeal now before me. With regard to the defendant Tula, it is alleged that he was the tenant of the land specified in the plaint; but that he had succeeded without the plaintiffs' knowledge in getting himself recorded in the village papers as being in possession of a 3/5th share in the said land as mortgagee. It was said that there was no *asiat*, reality or substance, in the alleged mortgage. It was further stated that these facts came to the knowledge of the plaintiffs when they sued the said

(1) (1898) 20 All. 482=1898 A.W.N. 123.

Tula for arrears of rent. Tula pleaded the mortgage and eventually, the decision was in his favour as regards the 3/5th share of which he claimed to be the mortgagee. The date of the decision of the Revenue Court against the plaintiffs on this point, namely, the 26th November, 1911, was stated as the date of the origin of the cause of action. In the last paragraph of the plaint, while specifying the reliefs sought, the plaintiffs for the first time admitted in a casual sort of way that they were aware that the defendant Tula was claiming to hold under two mortgage deeds of specified dates. The decree asked for is one for recovery of possession, on the ground that the land specified at the foot of the plaint is *muafi* land forming part of an endowment in favour of the shrine of Hazrat Shah Nandpir, which no one was entitled to mortgage, sell, or transfer in any other way. Then follows the specification of two mortgage deeds alleged to be in themselves null and void, and a prayer that they may be declared to be so. The dates of the mortgage deeds are given according to the *Fash* era. The earlier of the two is dated sometime in the year 1853 or 1854 A. D. while the date of the latter, which is the more important for the purpose now before me, corresponds with 5th February, 1859. The lower Appellate Court has recorded a finding that the persons who were, on the dates borne by these deeds, the trustees or managers of the shrine executed the mortgages in question in favour of Tula Pande, who thus became the mortgagee of a 3/5th share in the land in suit the whole of which had been his occupancy holding.

That Court also points out that the defendant's status as mortgagee to this extent was recognized at the Settlement of 1884 A. D., and that in the years 1866 and 1890 attempts to claim from him the rent of the land in suit had been defeated to the extent of the 3/5th share held on mortgage, upon the defendant's setting up the mortgages in question. The Court below holds it clearly proved that from the year 1866 onward, if not earlier, the defendant has been successfully asserting against the managers of the shrine his right to hold possession under the mortgages now called in question. On these findings the learned Subordinate Judge has dismissed the suit as barred by the 12 years' rule of limitation, whether Art. 134 or Art. 144 of Sch. I to the Indian Limitation Act, No. IX of 1908,

be applied. He supports himself by the decision of a Full Bench of this Court in *Behari Lal v. Muhammad Muttuki* (1). It is contended before me that the Court of first instance had recorded a finding to the effect that the defendant Tula had failed to prove that the mortgages in question were for valuable consideration, and that the lower Appellate Court should not have dismissed the suit without expressly reversing that finding. I have pointed out already the form in which the plaint was drawn up. The mortgage or mortgages under which the defendant Tula claimed to hold were indeed assailed as null and void, but the only reason put forward was that the property said to be mortgaged was trust property and so inalienable. The plaintiffs avoided mentioning the particular mortgage deeds which they desired to assail until the very end of their plaint, and even then never suggested that the person or persons who had executed these mortgages had received no consideration. The point was not raised by the pleadings and the defendant was not put to proof of the passing of consideration, even supposing that he could be expected, after the lapse of 50 or 60 years, to produce any evidence on the question of consideration other than the recital in the deeds themselves. The decision of the lower Appellate Court proceeds on the assumption that there was an actual contract of mortgage between the trustees of the endowment on one side and the defendant Tula on the other, that is to say, an actual transfer by way of mortgage which could only be called in question on the ground of the limited rights of the transferor in the property purporting to be dealt with. I think this is a reasonable view of the case on the facts as stated in the judgment of the lower Appellate Court. Apart from this, the decision of that Court has been supported before me on another ground. What the appellants now before me say is that, in the absence of an express finding that Tula was an assignee for valuable consideration from the then trustees of the *waqf*, the case is covered and limitation saved by the provisions of S 10 of the Indian Limitation Act, No. IX of 1908. The principle laid down by that section was introduced for the first time in the Limitation Act No. IX of 1871 which came into force on the 1st of July, 1871. The later of the two mortgage deeds now sought to be attacked bears a

date more than 12 years prior to the coming into force of the Act above mentioned. According to the principle laid down in *Jagamba Goswami v. Ramachandra Goswami* (2), the present suit would in any case be barred by the fact that Tula had been in possession, holding as mortgagee from the trustees of the endowed property, for 12 full years and more, prior to the coming into force of the Limitation Act of 1871. On these grounds I hold that this appeal fails and I dismiss it with costs.

Appeal dismissed.

(2) (1904) 31 Cal. 314.

A. I. R. 1915 Allahabad 316.

PIGGOTT, J.

Salle—Plaintiff-Appellant

v.

Mohan Lal—Defendant-Respondent.

Second Appeal No. 588 of 1914, decided on 8th May, 1915, from the decision of the Dist. J., Jhansi, dated 14th February, 1914.

Civil P. C. (V of 1908), S. 66—Suit by joint decree-holder for share of property on ground that auction sale was benami for him is barred by S. 66.

In execution of a simple money-decree held by two persons jointly, a certain *zemindari* property of the judgment-debtor was put up to sale and was with the permission of the Court purchased by one of the decree-holders in 1902. The purchaser was put in formal possession of the property in 1903. In 1913, the other decree-holder brought a suit against the purchaser and claimed possession of a share in the property, alleging that in accordance with an oral agreement the purchase was for the benefit of both the decree-holders.

Held, that the suit was barred by the provisions of S. 66 of the Code of Civil Procedure. (29 All. 557, Dist.). [P. 317, C. 1]

Girdhar Lal—for Appellant.

D. C. Banerji—for Respondent.

Judgment :—The plaintiff in this case, *Salle*, and the defendant, *Mohan Lal*, were joint-holders of a simple money-decree for Rs. 70-12-0 against one *Khet Singh*. A *zemindari* share belonging to *Khet Singh* was attached in execution of the decree and put up for sale. It appears that at one stage both the decree-holders had obtained permission of the Court to bid; but this permission lapsed

in consequence of the postponement of the sale. Later on *Mohan Lal* alone applied for permission to bid and, having received it, he became the certified purchaser of the share in question, at an auction-sale held on the 21st of July, 1902, for a sum of Rs. 60. He seems to have certified to the executing Court the receipt of Rs. 60 in part satisfaction of the decree. Formal possession was delivered to *Mohan Lal* on the 28th of July, 1903. In the present suit, filed on the 23rd of July, 1913, *Salle* claimed possession of the share in question in accordance with an oral agreement set up by him, to the effect that *Mohan Lal*'s purchase was to be for the benefit of both the decree-holders. He admitted that *Mohan Lal* had from the first refused to give him possession over any share in the property in suit. The Court of first instance dismissed the suit on various grounds. Primarily it held that the suit was barred by the provisions of S. 66 of the Code of Civil Procedure; further that, supposing the suit was maintainable in any form, it was barred by limitation and, finally, that no oral agreement of the nature alleged in the plaint was proved. The plaintiff appealed to the District Judge and his appeal has been dismissed. The form of the judgment passed by the learned District Judge is assailed in the memorandum of appeal to this Court. As a matter of fact the lower Appellate Court has set out clearly enough the points for determination, but has disposed of the appeal upon findings sufficient to warrant the dismissal of the suit, although they do not cover all the points before it for determination. The learned District Judge says, in effect, that the suit as brought does offend against the provisions of S. 66 of the Code of Civil Procedure and should be dismissed on that ground. He suggests, however, that if the plaint had been differently worded, and if the plaintiff had contented himself with asserting that the purchase made by *Mohan Lal* had been effected with the joint funds of *Mohan Lal* and the plaintiff and for the benefit of both, he might perhaps be permitted to maintain a suit for a declaration on the principles laid down by a Judge of this Court in *Achhaibar Dube v. Tapasi Dube* (1); but the learned District Judge remarks that the period of limitation for a declaratory suit, such as was contemplated by the learned Judge

(1) (1907) 29 All. 557 = (1907) A.W.N. 166.

who decided that case, is six years, so that even from this point of view the present suit must fail. It is contended before me in second appeal that the suit was one for the recovery of possession, governed by the twelve years' period of limitation, and that such a suit is maintainable on the facts set forth in the plaint. I am of opinion that the learned Munsif was right in holding that the suit as brought contravenes the provisions of S. 66 of the Code of Civil Procedure and should have been dismissed on this ground alone; from any point of view, the facts of the case are distinguishable from those of *Achhaibar Dube v. Tapasi Dube* (1), where the decree was a mortgage-decree and was exactly satisfied by purchase of the mortgaged property. The judgment in that case proceeded on its own facts and cannot, in my opinion, be relied upon as authority in the plaintiff's favour in the present case. Moreover, the learned District Judge is right in saying that, if any form of declaratory suit were maintainable on the facts alleged in the plaint, the period of limitation for such a suit would be six years. What the plaintiff in fact claims in the present case is that the defendant, Mohan Lal, is bound to hand over to him one-half share in the property in suit, unless he can produce evidence after an interval of ten years to satisfy the Court that the plaintiff, Salle, as a joint decree-holder, did receive one-half share in the sum of Rs. 60 bid by Mohan Lal as auction-purchaser of the property in suit. I am satisfied that the suit is not maintainable and I dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 317.

CHAMIER, J.

Raza Husain—Defendant-Appellant

v.

Mst. Hasan Jan—Plaintiff-Respondent

Civil Revn. Petn No. 20 of 1915, decided on 17th April, 1915, from the decree of the Small Cause Court J., Bareilly, dated 18th January, 1915.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 42—A suit for recovering money forced to pay to save property wrongfully mortgaged is suit for compensation and is cognizable—Suit against one wrong-doer is maintainable.

M and R mortgaged a property belonging to H for their own purposes. The mortgagee obtained a decree. H paid off the decree to save his property and subsequently sued R alone to recover the money.

Held, that the suit was for compensation for an imputent wrong committed against H by M and R and was cognizable by a Small Cause Court.

Held, further, that M was not a necessary party to the suit, as each of the two executors of the mortgage was jointly and severally responsible to recompense the plaintiff.

[P. 317, C. 2.]

Hamid Ullah—for Appellant.

Haider—for Respondent.

Judgment :—I admitted this application for revision, because it appeared to me that the suit was by one of several joint mortgagors of immovable property for contribution in respect of money paid by her for the redemption of the mortgaged property and was, therefore, excluded from the cognizance of a Court of Small Causes, being a suit of the kind described in Art. 42 of Sch. II of the Provincial Small Cause Courts Act. On examination of the record which has now arrived, I find that the suit is not of the description which I had supposed. It appears that one Muhammad Razi, who held a general power-of-attorney from the plaintiff, joined with the defendant, Raza Husain in borrowing Rs. 300 from a man called Lalta Prasad. As security for payment of the money they purported to mortgage certain property belonging to the plaintiff. Muhammad Razi, without reference to the plaintiff took advantage of the power-of-attorney in his favour to mortgage his employer's property and he actually signed the deed on her behalf as her *mukhtar*. The plaintiff had no knowledge of the transaction until a suit was brought upon the mortgage. In that suit a decree for sale was obtained by Lalta Prasad and the plaintiff's property was proclaimed for sale. In order to save the property the plaintiff paid off the amount of the decree, and she then brought the present suit against Raza Husain saying that she intended to bring another suit against the heirs of Muhammad Razi.

Raza Husain objected that the suit could not proceed in the absence of Muhammad Razi's heirs. This objection was rightly thrown out. Raza Husain and Muhammad Razi, according to the evidence, conspired together to mortgage for their own purposes property belonging to the plaintiff. It is quite clear that they became jointly and severally responsible to recompense the plaintiff. They could have been sued

together or either of them could have been sued alone. The property belonged to the plaintiff alone, and therefore, it is doubtful whether within the meaning of Art. 42 the executants of the bond could be described as joint mortgagors of the property. But assuming this much in favour of the defendant, I have no hesitation in holding that the suit is not one for contribution at all. The plaintiff does not admit that she is liable for any portion of the money. It is in reality a suit by her for compensation for an impudent wrong committed against her by the defendant and another person and was, in my opinion, cognizable by a Court of Small Causes. This application for revision by the defendant in this suit is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 318.

TUDBALL, J.

Katwaroo Singh—Plaintiff-Appellant

v.

Dharam Deo Singh and others—Defendants-Respondents.

Second Appeal No. 1324 of 1914, decided on 8th July, 1915, from the decision of the Sub-Judge, Ghazipur, dated 16th July, 1914.

Hindu Law—Mortgage-decree against all adult members is binding against minors—Suit for setting it aside on ground of being not party is not tenable—Civil P. C. (V of 1908), O. 34, R. 1.

A suit was brought against all the adult male members of a Hindu joint family on the basis of a mortgage-deed executed by all the adult male members and a decree was obtained. In execution of the decree, the mortgaged property was foreclosed and the decree-holder obtained possession of it. Subsequently, a minor member of the family brought a suit to set aside the decree on the ground that he was not a party to the suit in which the decree had been obtained:

Held, that he was fully represented in the former litigation, that he was not entitled to any relief on the mere ground that he was no party to the former suit, and that it was necessary for him to prove in the present case that the loan was not taken for a family necessity.

[P. 319, C. 1.]

Hameedullah—for Appellant.

Parmeshwar Dyal—for Respondents.

Judgment:—The facts of this case are very simple. The plaintiff in the year 1903 was a minor member of a joint Hindu family. There were three branches of this family in existence; that of the plaintiff, which was represented

by the plaintiff's brother, Charitar Singh, and himself; that of Hanuman Singh and Sita Ram Singh, and the third branch of Chatursal Singh. In the year 1903 on the 16th of July, Hanuman Singh, Sita Ram Singh, Charitar Singh and Chatursal Singh, that is, all the then adult male members of the family, combined together to borrow the sum of Rs 98-8-0 on a mortgage of some of the family property. In the deed it is set out that the money was taken for the purpose of purchasing bullocks. The family was a family which depended upon agriculture for its subsistence. The plaintiff's name does not appear in the bond. A suit was brought and a decree obtained on the 23rd of August, 1912. The four executants of the bond, and all their sons and grandsons, in fact all the members of the family *except the plaintiff*, were made parties to that suit. The plaintiff was still a minor. The decree was obtained and on the 2nd of June, 1913, there was a final decree for foreclosure. Possession was taken by the mortgagee on the 14th of June, 1913. On the 26th of November, 1913, the present suit was brought in the name of the plaintiff to set aside the whole transaction and to recover possession of the property on the one ground only that he was not a party to the previous suit. Among other defences, the defendants pleaded that the sum of Rs. 99-8 was taken for family necessity. The Court of first instance framed an issue as to whether or not the money had been taken for family necessity. The learned Munsif in writing down the issue in his judgment omitted certain words, but this omission was only in the judgment and not in the issue which was drawn up in the vernacular. The Munsif held that the loan had been taken for family necessity, that the plaintiff had been fully represented at the trial in the former suit and dismissed the suit. The Court below stated in its judgment that there was no evidence whatsoever to show that the money had been borrowed for family necessity but it went on to hold that the plaintiff was effectively represented in the former suit by the adult male members of the family, and that it was for him to prove that the loan had not been taken for any family necessity, and as the plaintiff had failed to prove any such thing, the suit was bound to be dismissed. The main point pressed before me is that it was for the

defendants to prove that the loan was taken for family necessity and was binding on the plaintiff and that the defendants not having proved it the plaintiff was entitled to a decree at least as to his 1/8th share of the estate, if not of the whole of the mortgaged property. The plaintiff in his plaint had asked for possession of 1/8th (his own share) of the property without payment of any sum and for the remaining 7/8ths on payment of what had been found due from the other members of the family. It seems to me that it is clear that the adult members of the family who took this loan were acting as the managing members of the family. There were no other adult male members at all. They were sued by the mortgagees. The latter took the precaution of making all their sons and grandsons parties to the suit. He apparently was unaware, though this is by no means clear, of the existence of the present plaintiff. It is difficult to understand why if he had been aware of his existence, he should not have made him a party to the suit. Be that as it may, it is quite clear that the four adult male members of the family who contracted the mortgage were also sued and were the managing members of the family. There is no allegation of fraud or of any dishonesty in the matter. The plaintiff came into Court and asked for relief on the sole ground that he had not been made a party to the former suit. He did not even allege that the mortgage was not binding upon him or that it was incurred for other than family necessity. In the circumstances of this case it seems to me that the plaintiff was fully represented in the former litigation; that he is not entitled to any relief on the mere ground that he was no party to the former suit, and it will be necessary for him to prove in the present case that the loan was not taken for family necessity. This he did not attempt to do. In my opinion he is not entitled to any relief and the Court below has properly dismissed the suit. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1915 Allahabad 319.

RICHARDS, C. J. AND TUDBALL, J.

Audh Bihari Pande—Plaintiff-Appellant

v.

Jadubans Misir and others—Defendants-Respondents.

Second Appeal No. 1124 of 1914, decided on 27th May, 1915, from the decision of the Additional District Judge, Gorakhpur, dated 27th April, 1914.

Pre-emption — *Wajib-ul-arz* — *Co-sharer* in same *thok* has right to pre-empt co-sharer vendee of different *thok*.

The *wajib-ul-arz* of 1833 of a village recorded the mere fact that the co-sharers had a right of pre-emption.

The *wajib ul-araiz* of 1860 and 1869 recorded that a near co-sharer had a right of pre-emption, after him the co-sharer in the same *thok* and after him the co-sharers in other *thoks*:

Held, that the co-sharer in the same *thok* as the vendor had a preferential claim as against the vendee who was a co-sharer in a different *thok*. [P. 319, C. 1; P. 320, C. 1.]

Haribans Sahai and *S. N. Sen*—for Appellant.

M. L. Agarwala and *Lakshmi Narain*—for Respondents.

Judgment :—This appeal arises out of a suit for pre-emption. The plaintiff is a co-sharer in the same *thok* as the vendor. The defendants-vendees are co-sharers but in a different *thok*. The plaintiff adduced in evidence an extract from the *wajib-ul-arz* of 1833 and from that of 1860 and 1869. The *wajib-ul-arz* of 1833 records the mere fact that the co-sharers have a right of pre-emption. The *wajib-ul-arz* of 1860 records that there is a right of pre-emption and that the near co-sharer has a right, and after him the co-sharer in the *thok*, and after him co-sharers in the other *thoks*. The *wajib-ul-arz* of 1869, in our opinion, is identical with the entry in the *wajib-ul-arz* of 1860, though in slightly different language. It is to be pointed out that both sides admit that some custom of pre-emption prevails in the village. The only question is whether it is an incident of the custom that the plaintiff as a co-sharer in the same *thok* as the vendor has a preferential right over the vendee who is a co-sharer in another *thok*. The Courts below have dismissed the plaintiff's suit. It seems to us that the evidence is all the one way and there was no rebutting

evidence. The only possible ground upon which it could be said that the plaintiff had no right was because the *wajib-ul-arz* of 1833 did not expressly record a right of co-sharers *inter se*. There is nothing necessarily inconsistent between the entry in the *wajib-ul-arz* of 1833 and that of the entry in the *wajib ul-araz* of 1860 and 1869. A Record of a Right of pre-emption amongst co-sharers does not exclude the possibility of there being rights *inter se*. In the present case we have the villagers in a village in which admittedly a custom existed twice recording the details of the right, first in 1860 and subsequently in 1869. In our opinion under the circumstances of this case the Court below was bound to have decreed the plaintiff's claim. With regard to the consideration, the first Court decided that the full amount had been paid and that evidence adduced by the plaintiff to show that the money had been given back was absolutely worthless. The lower Court did not decide this issue and we have accordingly considered the matter ourselves, and we think that the finding of the Court of first instance ought to be upheld. We accordingly allow the appeal, set aside the decrees of both the Courts below and give the plaintiff a decree for pre-emption conditional upon payment of the sum of Rs. 1,499 within three months from this date. If the money is paid within the time, the plaintiff will have his costs in all Courts including in this Court fees on the higher scale. If the money is not paid, the suit will stand dismissed with costs in all Courts, including in this Court fees on the higher scale.

Appeal allowed.

A. I. R. 1915 Allahabad 320.

CHAMIER AND PIGGOTT, JJ.

Abdul Rafi Khan and others—Decree-holders-Appellants

v.

Maula Bakhsh—Objector-Respondent.

Ex. First Appeal No. 360 of 1914, decided on 27th May, 1915, from the decision of the Sub-Judge, Azamgarh, dated 27th June, 1914.

Limitation Act (IX of 1908), Art. 182—Execution application without list under O. 21, R. 12, Civil P. C., is not application according to law and if not amended does not save limitation.

Where a decree-holder fails to annex to the application for execution of his decree an inventory of the property to be attached with a reasonably accurate description of the same, as required by O. XXI, R. 12, of the Code of Civil Procedure, the application is not in accordance with law within the meaning of Art. 182 of the Limitation Act, 1908, and cannot save limitation when it is dismissed for non-compliance with an order for amendment. (1892 A. W. N. 8 and 1892 A. W. N. 70, *Ref.*.)

[P. 320, C. 2; P. 321, C. 1.]

S. N. Sen—for Appellants.

Pearce Lal Banerjee and Iqbal Ahmad—for Respondent.

Judgment:—This is an appeal by the representatives of one Ali Bakhsh Khan deceased, who obtained a decree on July 10th, 1906, against an order of the Subordinate Judge of Azamgarh dismissing the appellants' application for execution on the ground that it was barred by limitation. The decree as already stated was passed on July 10th, 1906. The first application for execution was made in September 1909 and was struck off after the decree had been partly satisfied. The second application for execution was made on August 24th, 1910, and was ultimately struck off on March 24th, 1911. For the purposes of this appeal it may be assumed that the application of August 24th, 1910 was an application made in accordance with law to the proper Court for execution of the decree. The third application for execution was made on August 23rd, 1913, and was struck off on September 6th, 1913, the decree-holder having failed to comply with the order of the Court requiring him to make certain amendments in the application. The fourth application for execution was made on June 4th, 1914, and it is against the order of the Court dismissing the fourth application that this appeal has been brought. The question for decision in the appeal is whether the third application of August 23rd, 1913, was an application made in accordance with law to the proper Court for execution of the decree. When the application was presented, the office reported that there were many mistakes in columns 6, 7 and 8 of the application. It was also noticed that the prayer for relief was irregular. The prayer was that by means of attachment and sale of the property of the judgment-debtor, a list of which would be filed afterwards, the balance of the decree together with costs of the execution proceedings might be recovered. It has been held in many cases that it is not every defect or

mistake in an application for execution which obliges the Court to hold that the application is not one made in accordance with law. Speaking generally, the Courts have set themselves to inquire whether an application in question is in substantial compliance with law. For the purposes of this appeal we may disregard the mistakes and defects in Cols. 6, 7 and 8 of the application. But the failure of the decree-holder to annex to the application an inventory of the property to be attached with a reasonably accurate description of the same as required by O. 21. R. 12, Civil P. C., stands on a different footing. In *Hira Lal v. Dulari Kuar* (1) this Court held that an application for attachment of immovable property in execution of a decree which did not contain the particulars required by S. 237, Civil P. C., 1882, was not an application in accordance with law within the meaning of Art. 179, Sch. 2, Limitation Act 1877, and in *Mangal Sen v. Baldeo Prasad* (2), Mahmood, J., held that an application for execution of a decree by attachment of moveable property of the judgment-debtor unaccompanied by an inventory of the property sought to be attached was not an application in accordance with law within the meaning of Art. 179 Sch. 2, Limitation Act, 1877.

The learned vakil for the appellants has been unable to refer us to any case in which these decisions have been disapproved. But he has referred us to several cases in which defective applications for execution have been amended beyond limitation and the Courts have held that the amendment related back to the date of the application. Such cases have no bearing on the present appeal. Here although the decree-holder was given time to amend his application he did not amend it, and it is impossible for us some years afterwards to allow him to amend an application which was struck off on account of his failure to comply with the order of the Court requiring him to amend it. We must follow the decisions of this Court reported in the Weekly Notes for 1892, and hold that the application for execution put in on 23rd August 1913, was not an application in accordance with law within the meaning of Art. 182, Sch. 1, Limitation

Act, 1908 which governs the present case. If the application of 1913 is put out of the way the present application of June 1914 is clearly barred by limitation as held by the Court below. The appeal fails and is dismissed with costs including fees in this Court on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 321

PIGGOTT, J.

Sundar Lal—Plaintiff—Appellant.

v.

Malthu—Defendant—Respondent.

Second Appeal No. 814 of 1914, Decided on 7th June 1915, from decision of Addl. Dist. Judge, Etawah, D/- 7th March 1914.

(a) **Agra Tenancy Act (2 of 1901), Ss. 154 (b) and (c), 158 and 177 (c)—Suit for resumption of land rent-free—Defendant claimed declaration of proprietorship under S. 158—Appeal lay to District Judge under S. 177 (c).**

Where in a suit for resumption of land held rent-free filed in the Court of an Assistant Collector the defendant pleaded that it had been held rent-free for a period of 100 years and that he was entitled under S. 158, Tenancy Act, to be declared to be the proprietor of the land:

Held: that under S. 177 (c), Tenancy Act, an appeal lay to the District Judge from the decision of the Assistant Collector. [P 328 C 1]

(b) **Agra Tenancy Act (2 of 1901), S. 185—Decision recording finding without discussing evidence—In absence of certificate finding held to be finding of facts.**

Where the District Judge misapprehended a certain entry in the *Wajibulaz* and, while recording a finding did not in express terms discuss the evidence upon which the finding was based, the High Court in the absence of a certificate that the finding rested upon no evidence treated the decision of the lower appellate Court on this point as a finding of fact with which it could not interfere. [P 323 C 2]

L. R. Dube—for Appellant.

Brij Nath Vyas—for Respondent.

Judgment.—In this suit the plaintiff, who is the appellant here, sought a decree for the resumption of certain rent-free land, consisting of five specified plots with a total area of 5 bighas 4 biswas, in the possession of the defendant-respondent. The suit was filed in the Court of an Assistant Collector of the First Class. He came to the conclusion that the grant in question was resumable at the pleasure of the grantor, and he gave the plaintiff a decree accordingly. The defendant appealed to the District Judge.

(1) [1892] A. W. N. 3.

(2) [1892] A. W. N. 70.

It would not appear from the judgment of the lower appellate Court that any objection was taken in that Court with regard to the proper form of appeal. The learned District Judge found on the evidence, and principally on the interpretation of a particular clause in the *Wajib-ul-arz* of 1872, that the grant in question was not resumable at the pleasure of the grantor. It does not seem that it was ever suggested, or was ever part of the plaintiff's case, that the grant was liable to resumption under Cl. (b) or Cl. (c), S. 154, sub-S. (1), Tenancy Act. The finding of the lower appellate Court on this point amounts therefore to a finding that this land was not liable to resumption under S. 154, Tenancy Act. The learned Additional Judge went on to say:

"On the evidence I also find that this *muafi* has been held for 50 years and by two successors to the original grantee."

He accordingly declared the defendant, the holder of the said grant, to be the proprietor thereof under S. 158, *Agra Tenancy Act*. Having allowed the appeal to this extent, he sent back the case to the Court of the Assistant Collector in order that the matter might be finally determined in accordance with the provisions of S. 158 aforesaid by an order fixing the revenue payable by the defendant.

The plaintiff comes to this Court in second appeal. It is contended first that no appeal lay to the District Judge from the decision of the Assistant Collector. Undoubtedly a suit for the resumption of a rent-free grant or a suit for the assessment to revenue of a rent-free grant, is placed in Sch. 4, *Agra Tenancy Act*, in group C, that is to say, amongst suits triable by an Assistant Collector of the first Class in which appeal lies to the revenue Court. This specification in the schedule must however obviously be read subject to the provisions of S. 177, Cl. (c), according to which an appeal lies to the District Judge from the decree of an Assistant Collector of the first Class in all suits (no matter what may be the group of Sch. 4), to which such suits are assigned, in which a question of proprietary title has been in issue in the Court of first instance and is a matter in issue in the appeal. In the present case the defendant had pleaded all along that the land in suit was not liable to resumption under S. 154, and that it had been

held rent-free for generations, or at least for a period of a 100 years. He expressly pleaded in fact that he was entitled under S. 158, Tenancy Act, to be declared to be the proprietor of this land. The question whether upon these pleadings it can be said that a question of proprietary title has been in issue within the meaning of S. 177, Cl. (c), would seem to be open to argument, but I find that the point is covered by authority. The appellant no doubt relies upon the decision of a Bench of this Court in *Baldeo Singh v. Mardan Singh* (1), and he is able to point out that in that case a suit apparently very similar to the present was in fact appealed from the Court of the Assistant Collector to that of the Commissioner, and was thence taken to the Board of Revenue for final decision.

It is clear however that the point which the learned Judges of this Court had before them for determination in that case was totally different from the question now before me. They had to decide whether a party who had failed in the Revenue Courts in a suit to which the provisions of Ss. 150 and 154, Tenancy Act, applied, was entitled to challenge the decision of the revenue Courts by means of a fresh suit instituted in a civil Court as a Court of first instance. Such a suit the learned Judges held to be clearly barred by the provisions of S. 167, *Agra Tenancy Act*. That section, however reserves the appellate jurisdiction of the civil Courts in all cases to which S. 177 of the Act applies. Hence that ruling simply brings me back to the question whether or not the provisions of S. 177, Cl. (c), apply to the appeal filed by the defendant in this case in the Court of the District Judge. I have been referred to two authorities on this point, one is an unreported decision by a single Judge, *Nawab Sayed Ali Hasan Khan v. Mohan Das*, *Civil Revision No. 1 of 1907*, decided on 29th April 1907. In that case a suit for resumption had been dismissed by the Assistant Collector in whose Court it was filed. The plaintiff appealed to the District Judge and the latter held that the appeal lay only to the Court of the Commissioner, and he returned the memorandum of appeal for presentation to the proper Court. This order was reversed by this Court in revision and

the District Judge was directed to entertain and dispose of the appeal. The next case is the case of *Sunder Singh v. Collector of Shahjahanpur* (2). The head-note to the report (8 A. L. J.) refers to a different matter; but the report itself shows that the learned Judges distinctly held that the provisions of S. 177 Cl. (c), Tenancy Act, did apply to a case in which the pleadings were substantially the same as those in the case now before me. I accordingly overrule the appellant's contention on this point on the ground that it is concluded by authority.

In the second place, it is contended that the land in question in this suit is held rent-free under a liability to resumption at the pleasure of the grantor, and that the finding of the lower appellate Court to the contrary is based upon a misinterpretation of the documentary evidence, viz., the *Wajibularz* of the year 1872 A. D. In that document the land in suit is included in a specification of certain rent-free holdings in respect of which it is said that they shall continue to be held rent free but that, if at any time the proprietor desires to get them assessed to rent, he will bring a suit for that purpose in the proper Court and will be bound by the decision of that Court. There is certainly some ambiguity about these provisions. The learned District Judge however has relied upon a decision of the Board of Revenue in a case from that same district which seems to have been regarded as a test case and on which the Board of Revenue held that provisions in a *Wajibularz* very similar to those in the document now before me did not constitute the grant resumable at the pleasure of the grantor. I am not prepared to say that the learned District Judge was wrong and I overrule this contention accordingly.

A third point has been argued before me which presumably purports to be taken in paras. 1, 4 and 6 of the memorandum of appeal before me. In effect the contention is that the lower appellate Court was not entitled on the evidence before it to find that the land in question was a grant which had been held rent free for 50 years and by two successors to the original grantee. The learned District Judge, while recording this finding in express terms, has not discussed the evidence upon which it is based.

(2) [1911] 33 All. 558=11 I. C. 514.

The memorandum of appeal before me contains no certificate that this finding in the judgment of the lower appellate Court rests upon no evidence. It has been suggested that the learned District Judge must have presumed that a certain entry in the *Wajibularz* of 1833, which was put in evidence by the defendant, referred to the whole of the land in suit whereas if that document be attentively examined it is evident that it can refer only to a portion of the said land. I should feel some difficulty in deciding whether even a misapprehension of this sort would justify interference in second appeal; but the learned District Judge had before him oral evidence as well. I am not entitled, sitting as a Court of second appeal to appraise that evidence myself. But having read it along with the *Wajibularz* of 1833, I can only say that I feel compelled to treat the decision of the lower appellate Court on this point as a finding of fact with which I cannot interfere.

This appeal therefore fails and I dismiss it accordingly with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 323

BANERJI, J.

Bhagirathi Noniya — Defendant—Appellant.

v.

Sukhdeo Noniya—Plaintiff — Respondent.

Second Apyeal No. 641 of 1914, Decided on 26th April 1915, from decision of Dist. Judge, Benares, D/- 17th February 1914.

Civil P. C. (5 of 1908), S. 152—Court can correct clerical error of writing an order of dismissal instead of decreeing claim.

A Munsif, by a clerical error, recorded in his final order an order dismissing the suit instead of decreeing it. The decree was prepared in accordance with the final order.

Held; that the Munsif had jurisdiction under S. 152, Civil P. C., to subsequently correct the error. [P 323 C 2]

Iqbal Ahmad—for Appellant.

Suleman—for Respondent.

Judgment.—The only question raised in this appeal is whether the learned Munsif was justified in correcting his judgment and decree. What happened was that the plaintiff brought a suit for possession of property left by one Sheoraj claiming the whole of it on the ground that he was the only son of Sheoraj. The defendant Bhagirathi claimed to be

another son of Sheoraj by another wife. This was denied on behalf of the plaintiff, and the Court of first instance found that the defendant was not the son of Sheoraj and that the plaintiff alone was entitled to the property. By a clerical error, instead of recording a decree in favour of the plaintiff, the final order of the Munsif was one of dismissal of the suit, a decree was drawn up in accordance with this judgment. It having been brought to the notice of the learned Munsif that an error had crept into the judgment, he corrected the judgment and the decree, and substituted for the word "dismissed" the word "decreed." It is urged that the Munsif had no power to make this correction and that his original decree dismissing the suit should hold good. I do not agree with this contention. S. 152, Civil P. C., was enacted clearly with the object of enabling the Court to correct clerical mistakes made by it in the judgment or decree or in any order. The Munsif's judgment shows that the findings were all in favour of the plaintiff and that he intended to decree the claim. It was only by an oversight that he wrote out an order of dismissal. After the correction of the judgment and the decree the defendant appealed to the District Judge and on the merits the learned Judge found against the defendant. So that neither on the point of law nor on the merits the defendant-appellant had any case. I dismiss the appeal with costs, including fees on the higher scale.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1915 Allahabad 324**

CHAMIER AND PIGGOTT, JJ.

Bankey Bihari Lal—Defendant—Appellant.

v.

Charni—Plaintiff—Respondent.

First Appeal No. 4 of 1915, Decided on 10th May 1915, from order of Dist. Judge, Cawnpore, D/- 10th December 1914.

Agra Tenancy Act (2 of 1901), S. 165—Suit under S. 165 against lambardar is maintainable

A cosharer by becoming a lambardar does not cease to be a cosharer and therefore a suit brought against him by another co-sharer under S. 165, Tenancy Act, is not bad in law; *G. I. C. 809, Ref.* [1910] G. I. C. 809.

Kailas Nath Katju—for Appellant.*K. N. Laghate*—for Respondent.

Chamier, J.—This appeal arises out of a suit brought by the respondent against the appellant for his share of the profits of a mahal for the years 1318, 1319 and 1320 Fasli. The respondent in his plaint described the appellant as a cosharer and the suit as one brought under S. 165 Tenancy Act, which provides for a suit by a cosharer against another cosharer for a settlement of accounts and for his share of the profits of a mahal. The appellant pleaded that he was the lambardar of the mahal and that the suit should have been brought against him not under S. 165, but under S. 164, Tenancy Act. The Assistant Collector fixed issues on the questions whether the appellant was a lambardar of the mahal and whether, if he was a lambardar, the suit could be maintained under S. 165 of the Act. He found that the appellant was a lambardar and that the suit could not be maintained against him under S. 165, Tenancy Act. He gave the respondent an opportunity of amending his plaint by describing the appellant as lambardar and the suit as one brought under S. 164. The respondent declined to amend his plaint and the suit was dismissed. The respondent appealed.

The District Judge reversed the decision of the Assistant Collector and remanded the suit for trial on the merits, on the ground that the appellant had not by becoming a lambardar ceased to be a cosharer, and there was no reason why the respondent should not have framed his suit under S. 165. The learned Judge was of opinion that the description of the suit was a minor matter and that the suit should have been tried out. In this appeal it is contended that a suit under S. 165 is a suit of a different description from a suit under S. 164 and we were referred to the decision of this Court in *Chunno Lal v. Parbhu Dial* (1). Where a defendant is a lambardar, as in a suit under S. 164, he is entitled to deduct his haq-lambardari and village and other expenses; whereas a cosharer defendant in a suit under S. 165 is not entitled to such deductions. The appellant in the present case pleaded and proved that he was lambardar and on that account entitled to deduct haq-lambardari and village and other expenses. That was merely a question of account which the

Assistant Collector could have disposed of. The respondent was perhaps badly advised in declining to meet the Assistant Collector's wishes by amending his plaint. But as an amendment was not really necessary, it seems to us that the Assistant Collector was wrong in dismissing the suit. He ought to have tried out the suit and given the appellant credit for the haq-lambardari and village and other expenses. It is possible that the respondent was afraid that if he amended the plaint, he would be told that the suit had become one of a different character and therefore must be dismissed. The result might be that the respondent's claim for profits for one year would be barred by limitation. In my opinion the District Judge was right in remanding this case for trial on the merits and I would dismiss this appeal with costs.

Piggott, J.—I concur.

By the Court.—The order of the Court is that this appeal is dismissed with costs.

▼ B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 325

KNOX, J.

Khelawan Koeri—Defendant—Appellant.

v.

Abdul Rahim—Plaintiff—Respondent.

Second Appeal No. 610 of 1914, Decided on 17th May 1915, from a decision of Addl. Dist. Judge, Gorakhpur, D/- 28th January 1914.

Pre-emption—Decree—Mere application to withdraw money does not take away right of appeal.

In a pre-emption suit decree was passed in favour of the plaintiff. The plaintiff deposited the money to be paid to the vendee in Court. The vendee applied to withdraw the money so deposited but did not, as a matter of fact, withdraw it.

Held: that by making the application to withdraw, the vendee did not lose his right to appeal. [P. 25 C 2]

Iswar Saran and Parmeshwar Dayal—for Appellant.

M. L. Agarwala—for Respondent.

Judgment.—In the Court of first instance the plaintiff, who is here respondent, instituted a suit for pre-emption, stating that he was entitled to pre-empt both under the Mahomedan law and the village custom. The Court of first instance held that the plaintiff was entitled to pre-empt and give him a decree

accordingly. The date on which he granted the decree was 20th August 1913. From that decree the defendant filed an appeal on 3rd November 1913. That appeal was within time as the vacation intervened. Upon the Court proceeding to hear the appeal, a preliminary objection was taken on the part of the plaintiffs to the effect that the defendant had accepted the decree and could no longer appeal from it. The acceptance was said to be on this wise, namely that on 5th September 1913 which was within the month of the period granted to the plaintiff to deposit the pre-emption money, the defendant applied to withdraw the money which had been deposited. Along with the application to withdraw the money, he filed an application stating that he was willing to accept this money and asking that it be given to his pleader, Munshi Wajid Ali. Upon this application the Court passed an order that the money should be paid; but before it was actually paid the defendant had filed a second application stating that he had changed his mind, would not now accept the money and had in fact on 3rd November filed this appeal. The lower appellate Court held that the defendant could not be allowed to blow hot and cold and that by his first application he had accepted the decree, and dismissed the appeal. The defendant now comes to this Court and says that by what he did he had not lost his right to appeal.

No authority has been cited to me either one way or the other, except the case of *Anant Das v. Ashburner and Company* (1) and that of *Moonshee Ameer Ali v. Maharajee Inderjeet Singh* (2). Neither of the cases cited appears to be in point. The facts which govern them are quite distinct from those which govern this appeal. There was no agreement in the present case on the part of the defendant by which he is precluded from filing an appeal. This being so and the appeal having been disposed of by the lower appellate Court on a preliminary point which is now reversed, I remand the case to the lower appellate Court with directions to re-admit the appeal under its original number in the register and

(1) [1875-78] 1 All. 267.

(2) [1870-72] 14 M. L. A. 203=9 B. L. R. 460=2 Suth. 470=2 Sar. 743=20 E. R. 763 (P. C.)

proceed to determine it in accordance with law. Costs will abide the event.
V.B./R.K. *Case remanded.*

A. I. R. 1915 Allahabad 326

Full Bench

RICHARDS, C. J., AND TUDBALL AND
RAFIQUE, JJ.

Ashraf Ali—Defendant—Appellant.

v.

Kalyan Das and others—Plaintiffs—Respondents.

First Appeal No. 281 of 1913, Decided on 4th June 1915, from decree of Addl. Sub-Judge, Aligarh.

U. P. Court of Wards Act (3 of 1899), Ss. 16, 18 and 20—S. 20 applies to those who have notified their claims under S. 16 but failed to produce documents—Mortgagee who did not notify can sue and mortgage is admissible—No interest under S. 18.

Section 20, U. P. Court of Wards Act, 1899, applies only to the case of persons who have notified their claims under the provisions of S. 16 of the Act but have failed to produce their documents.

Therefore, a mortgagee, who did not notify his claim under S. 16, U. P. Court of Wards Act, 1899, is entitled to maintain a suit on his mortgage and his mortgage is admissible in evidence, but he will not be allowed interest under S. 18 of the Act. [P 326 C 2]

B. E. O'Connor and Tej Bahadur Sapru—for Appellant.

Sundar Lal and S. K. Dar—for Respondents.

Judgment.—This appeal arises out of a suit on foot of two mortgages, the first, dated 7th August 1907, for Rupees 6,500 and the second, dated 11th February 1909, for Rs. 1,000. The plaintiff claims Rs. 10,794 on foot of the two mortgages. The estate of the mortgagors was taken over by the Court of Wards and a notification was duly issued, with effect from 29th July 1911, under S. 16, Court of Wards Act, 3 of 1899. The mortgagees did not, in compliance with the provisions of S. 16, notify their claim under the two mortgages against the estate. It appears that there was some notification of one of the mortgages in October 1912. This however may, for the purposes of our judgment, be disregarded. The estate is not now and was not at the time of the institution of this suit under the management of the Court of Wards. The management was given up in November 1912. The Court below has given the plaintiffs a decree for the full amount of the claim.

In appeal it is contended that the plaintiffs having failed to produce their documents before the Collector, the same are inadmissible in evidence, having regard to the provisions of S. 20. Of course if the plaintiffs are unable to adduce their mortgage-deeds in evidence, they cannot sustain their suit. On the other hand, it is contended that S. 20 only applies to the case of persons who have notified their claims under the provisions of S. 16 but have failed to produce their documents. It seems to us that the latter contention is clearly correct. S. 17 of the Act provides that notwithstanding the provisions of the section any person who has a claim, whether it be allowed or disallowed by the Court of Wards, is entitled to institute a suit, and that notwithstanding that the claim has not been notified. It may possibly be said that this provision only applies to the matters mentioned in the earlier part of the same section.

But S. 18 makes the matter abundantly clear. In S. 18 the penalties for not notifying a claim are set forth. Interest is to cease to run from the date upon which the claim should be notified. Cl. (2) provides that claims not notified are postponed to all claims that have been notified. If S. 20 applied to cases where there had been no notification, it would, practically speaking, amount to an enactment that no suit could be brought where a claim had not been notified. If no claim had been notified no documents would be produced. But the words of S. 20 themselves show that it only deals with cases where there has been a notification under S. 16. The new Act, which was not in force at the time the estate was taken over by the Court of Wards, has laid down entirely new penalties for the failure to notify. S. 18 provides as follows:

"Subject to the provisions of S. 20, every claim of the nature specified in S. 17 against the ward or his property, other than debts due to or liabilities incurred in favour of the Government, which is not notified under S. 17, shall be deemed, for all purposes and on all occasions, whether during the continuance of the superintendence of the Court of Wards or afterwards, to have been duly discharged."

On behalf of the appellants the case of *Collector of Ghazipur v. Balbhaddar Singh* (1) is relied upon. At p. 29 of the judgment there is the following passage:

(1) [1912] 17 I. C. 25.

"It was suggested that the obligation to produce documents is laid upon creditors who notify their claims. The argument is that a creditor who does not notify his claim at all may make himself liable to the provisions of S. 18 already quoted, but cannot be held liable to the further disability laid down by S. 20. There is nothing in the wording of the Act to support this contention, indeed it appears contrary to the clear intention of the provisions under consideration."

We cannot agree with these remarks. It seems to us that the wording of the Act shows that the contention is correct.

The only question which remains is the question of the amount of interest allowed. This is a point which is not taken in the memorandum of appeal. We think however that we ought to give effect to the clear provisions of S. 18. This provides that every claim, save as in the section mentioned, shall cease to bear interest from the date of the expiry of the period prescribed by this section. It is true that one of these mortgages was not payable for a period of five years. It was however nevertheless a "claim" against the estate, and we think that under the provisions of the section it ceased to bear interest from 29th January 1912, that is to say, six months after the notification. At the same time we think that the plaintiffs ought to have their costs proportionate to their success in both Courts, the point not having been taken in the memorandum of appeal to this Court.

We accordingly vary the decree of the Court below by directing that interest shall be disallowed on both mortgages from 29th January 1912 up to the date of the institution of the present suit. From that date the plaintiffs will have simple interest at the rate of Rs. 6 per cent per annum up to the date of payment. We extend the time for redemption for a period of six months from this date.

V.B./R.K.

Decree varied.

A. I. R. 1915 Allahabad 327

TUDBALL AND RAFIQUE, JJ.

Ram Karan—Defendant—Appellant.

v.

Madhukar Prasad—Plaintiff—Respondent.

Privy Council Appln. No. 4 of 1915, Decided on 1st May 1915.

Civil P. C. (5 of 1908), S. 110—Dismissal for default is confirmation of lower Court's decision for S. 110.

A decree of the High Court dismissing an appeal for default of prosecution is a decree affirm-

ing the decision of the Court below within the meaning of S. 110, Civil P. C. : 20 All. 367, *Foll.* [P 327 C.2]

S. C. Banerjee—for Appellant.

A. P. Dube—for Respondent.

Judgment.—This is a petition for leave to appeal to His Majesty in Council. The appeal to this Court was valued by the appellant at Rs. 200. It was from an order of the District Judge removing him from his post as trustee of certain trust property. The trust property is said to have an annual income of over Rs. 2,300. It is therefore clear that the decree or final order involves, directly or indirectly, some claim or question to or respecting property of the value of Rs. 10,000 and over. But there are two other points for decision. The first one is whether the decree against which the applicant seeks to appeal does or does not affirm the decision of the Court below. The appeal to this Court was dismissed for default of prosecution and costs were awarded to the opposite party. A very similar question arose in *Beni Rai v. Ram Lakhan Rai* (1).

In that case it was held that the decree of this Court dismissing an appeal for want of prosecution was a decree affirming the decision of the Court below within the meaning of S. 596, Civil P. C. The language of the rules in the present Code of Civil Procedure corresponding to S. 596 has not been altered. The result of the order dismissing the appeal for default is practically an affirmation of the decision of the Court below. In this case therefore we have to see, whether the appeal which the applicant wishes to prosecute involves some substantial question of law. Six grounds of appeal are entered in the application. The first ground is the only one which relates to the order of this Court dismissing the appeal for default. That raises no question of law whatsoever. The remaining five all relate to questions which arose between the parties on the merits in the Court below. They do not relate to our order of dismissal for default, from which this application has arisen. Of these five grounds only ground 4 has been indicated to us as involving any question of law. The question involved depends upon the findings of fact arrived at by the Court below and affirmed by our order of dismissal. These facts being against the appellant,

(1) [1893] 20 All. 367=(1898) A. W. N. 77.

we can see no substantial question of law which arises for decision.

In our opinion the applicant is not entitled to the certificate which he seeks. This application is rejected with costs.

V.B./R.K.

Application rejected.

*** A. I. R. 1915 Allahabad 328**

TUDBALL AND CHAMBER, JJ.

E. I. Ry—Defendant—Appellant.

v.

M. K. Roy—Plaintiff—Respondent.

Second Appeal No. 469 of 1914, Decided on 17th May 1915, from decree of First Addl. Judge, Aligarh.

*** Railways Act (9 of 1890), S 75—No liability for loss of passenger's luggage containing silver and silk in absence of declaration.**

The luggage of a passenger which is booked is a package within the meaning of S. 75, Ry. Act. If the luggage contains silver and silk as regards which the passenger does not make any declaration at the time of booking, Railway Company is not liable for its loss. [P 328 C 2, P 329 C 1]

W. Wallach—for Appellant

Surendro Nath Sen—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiff respondent under the following circumstances:—The plaintiff travelled on 3rd July 1912 as a passenger from Howrah to Khurja by the up Amballa express train on the East Indian Railway. He had three parcels of luggage: two bundles and a steel trunk. These were weighed and delivered by him to the railway administration and placed in the luggage van. Only two bundles were delivered at the end of his journey. The steel trunk was lost. He therefore sued the railway for Rs. 461-8-0, the value of the box and its contents, plus Rs. 40 damages, total Rs. 501. At the time the luggage was booked he did not declare the nature of the contents. According to his plaint the trunk contained besides ordinary clothing some silk articles the value of which comes to over Rs. 300 and also some silver articles of the value of about Rs. 60. These are all articles which are mentioned in Sch. 2, Railways Act.

The Railway Company pleaded that as the plaintiff had not declared these articles it, the company, was not liable in view of the terms of S. 75, Railways Act. The Courts below did not accept this plea and decreed the suit in favour of the plaintiff. The Railway Company appeals and the same point is raised before us. The point is one which is covered by the rulings to be found in *Mahomed Abdul*

Ghaffar v. Secy. of State (1) and *Anwar v. Simla Kalka Railway Co. (2)*. The Court below has relied on a decision of the Calcutta High Court in *Veleyat Hossein v. Bengal and North-Western Railway Co. (3)*. In this case no question of the applicability of S. 75 arose. The articles which were in dispute therein were durries, which do not come within Sch. 2 of the Act. The Railway Company had sought to free itself of its liability in that case by pleading a certain rule made by itself which the Court held to be in conflict with the terms of S. 72 of the Act and, therefore of no force. However even in that judgment there is a remark which is in favour of the appellant before us. At p. 823 the judgment runs as follows:

"A rule made under the Act is not a provision of the Act, and the words have an obvious reference to S. 73 relating to the carriage of animals, and to S. 75 relating to the carriage of articles of special value, which are expressly framed to place certain restrictions on the full operation of S. 74."

It is clearly an expression of opinion that S. 74 of the Act is governed by S. 75. The argument on behalf of the respondent is that S. 74 is the only section in the Act which governs the case of passengers' luggage, and that S. 75 has nothing to do with luggage whatsoever. In our opinion there is no force in this contention. The steel trunk was no less a package or parcel because it was booked as luggage. The language of S. 75 is general. It provides:

"When any articles mentioned in the Sch. 2 are contained in any parcel or package delivered to a railway administration for carriage by railway and the value of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package, unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared, or declared them at the time of the delivery of the parcel or package for carriage by railway, etc."

In the present case the plaintiff delivered a package to the railway administration for carriage by railway. That package contained articles mentioned in Sch. 2 of value over Rs. 100. The facts of the present case are clearly and distinctly within the meaning of the language of S. 75, which is a section of general application to all classes of goods.

(1) [1897] 56 P. R. 1897.

(2) [1907] 73 P. R. 1907=15 P. L. R. 1908.

(3) [1909] 36 Cal. 812=3 I. C. 470.

In our opinion the appeal is well founded. The plaintiff having failed to declare the articles the value of which he seeks to recover, the Railway Company is not liable for the loss of the trunk and its contents. We allow the appeal and set aside the decrees of the Courts below. The plaintiff's suit will stand dismissed with costs in all Courts.

V.B./R K.

Appeal decreed.

A. I. R. 1915 Allahabad 329

CHAMIER, J.

Dhani Sahu—Defendant—Appellant.

v.

Raj Mahal Kunwari Plaintiff—Respondent.

Second Appeal No. 704 of 1911, Decided on 4th May 1915, from decree of Addl. Judge, Gorakhpur.

Agra Tenancy Act (2 of 1901), S. 83—Expropriatory right ceases to exist after relinquishment.

The effect of the relinquishment of expropriatory rights is as if the expropriatory rights had never come into existence at all. The person in whose favour the relinquishment of expropriatory rights is made cannot subsequently claim those rights. [P 329 C 2]

A. P. Dube and Jung Bahadur Tal—for Appellant.

Haribans Sahai—for Respondent.

Judgment.—Sheo Dihal made a simple mortgage of a two-annas share in a village in favour of the respondent. Seven years later he made a usufructuary mortgage of nine-pies out of the two annas shares in favour of the appellant. A few days after this mortgage the mortgagor executed a deed of relinquishment in respect of his expropriatory rights in certain plots of land aggregating 18 bighas or so. The first mortgagee brought a suit upon her mortgage impleading the second mortgagee. She obtained a decree, brought the property to sale, and purchased it herself. She obtained formal delivery of possession of the entire two-annas share. But the appellant declined to give up possession of the 18 bighas odd, the expropriatory rights in which had been relinquished by the mortgagor. This is a suit for possession of the nine-pies share including the 18 bighas odd.

The first Court decreed the claim for the share but dismissed the claim for possession of the plots. On appeal the Additional District Judge gave the respondent a decree for possession of 9 bighas 6 biswas 5 dhurs and for mesno

profits of the same. He dismissed the claim of the respondent as regards the remaining 9 bighas, on the ground that she had failed to prove that the appellant held possession of those 9 bighas. On behalf of the defendant-appellant it is contended that the respondent is not entitled to possession of any portion of the land, in which the mortgagor became entitled to expropriatory rights on the making of the usufructuary mortgage, and that the relinquishment of his expropriatory rights by the mortgagor operated for the benefit of the appellant only. In my opinion the learned Judge has taken a correct view of this matter. The mortgagor became entitled to expropriatory rights but deliberately relinquished them. No one could prevent him from doing so. The result of the relinquishment was to improve the security held by the mortgagees. In the first instance, no doubt, the relinquishment operated more for the benefit of the second mortgagee than for that of the first mortgagee, because it enables the second mortgagee to obtain actual possession of land which he could not otherwise have obtained: but, in my opinion, when the property was sold in execution of the decree on the first mortgage the purchaser became entitled to proprietary rights in the whole two annas. The expropriatory rights had been carved out of the two-annas share by the law but subsequently ceased to exist.

To my mind it is as if the expropriatory rights had never come into existence at all, and there is no more ground for refusing to give the purchaser possession of these plots than for refusing to give him possession of any other plot included in the usufructuary mortgage. The appeal, therefore, fails. Cross-objections have been filed by the respondent to the effect that the Court should have decreed possession of the entire 18 bighas and mesno profits of the same. I have been referred to a number of rubkars recorded by the first Court. None of them show that the appellant held actual possession of the whole 18 bighas. They show that the parties elected not to give oral evidence and they state the result of an examination of some of the documentary evidence. No attempt has been made to show me that the documentary evidence proves that all the plots specified at the end of the

plaint were in fact in possession of the appellant. The District Judge finds that it is not proved that the appellant held possession of all the plots. I accept his finding. The result is that the cross-objections also fail. Both the appeal and the cross-objections are dismissed with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1915 Allahabad 330 (1) Full Bench

RICHARDS, C. J., BANERJI AND
TUDBALL, JJ.

Mt. Lahaso Kunwar — Plaintiff—Appellant.

v.

Mahabir Tewari and others—Defendants—Respondents.

Second Appeal No. 1183 of 1913, Decided on 9th April 1915, from decision of Sub-Judge, Ghazipur, D/- 30th April 1913.

Cosharer — Exclusive possession by one raises presumption of other's consent—Other cannot demolish building after standing by for many years.

Where one cosharer is for many years in exclusive possession of a particular plot and makes constructions thereon, the presumption is that he is so in possession with the consent of the cosharers. The other cosharers cannot after lying by for many years come in and ask to have the constructions demolished. [P 330 C 2]

S. K. Dar — for Appellant.

Lakshmi Narain for *M. L. Agarwala*—for Respondents.

Judgment.—This appeal arises out of a suit in which the plaintiff sought a declaration that the share of the plaintiff and defendants No. 38 and 39 amounts to three-eighths in a plot No. 703, and that she might have a decree for joint possession of the plot and for removal of a thatch and for the restoration of a ditch said to have been filled in. Notwithstanding the pleadings it is quite clear that the (contesting) defendants' contention was not that the plot in question did not form part of the joint property of the cosharers, but that they for a very long time had been in possession and had sunk a well and made certain constructions. In the lower appellate Court the defendants raised no controversy as to the proprietary title of the parties to the plot in question. All that they contended was that having regard to the long time they had been in possession, the plaintiff was not entitled to put them out or to have con-

structions demolished. It is perfectly clear that in the event of a partition the plot in question will have to be taken into consideration. The authority making the partition will have regard to the rules that as far as possible parties in possession shall be left in possession and if that is found to be impossible and a certain plot (on which are buildings) in the possession of one party has to be put into the lot of another rent will be assessed. Where one cosharer is for many years in exclusive possession of a particular plot and makes constructions thereon the presumption is that he is so in possession with the consent of the cosharers. The other cosharers cannot after lying by for many years come in and ask to have the constructions demolished. We think that the view taken by the Court below was correct and ought to be affirmed. There is no question of adverse possession in the case. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1915 Allahabad 330 (2)

RICHARDS, C. J. AND RAFIQUE, J.

Shiva Chander Singh and others — Plaintiffs—Appellants.

v.

Ram Chander Singh — Defendant — Respondent.

Second Appeal No. 571 of 1914, Decided on 22nd June 1915, from decree of Judge of Moradabad.

Agra Tenancy Act (2 of 1901), S. 164 — Cosharers proving fact of arrears of rent and solvency of tenants—Onus of proving reason for non-collection of rent lies on lambardar.

In a suit for profits against a lambardar if the cosharers give general evidence to show that the rents are greatly in arrear, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the onus is shifted on to the defendant of showing that for some reason not connected with his own negligence or misconduct he was unable to collect the rents: 17 I. C. 914, *Appr.* [P 331 C 1]

Gokul Prosad—for Appellants.

M. L. Agarwala—for Respondent.

Judgment.—This appeal arises out of a suit brought by cosharers against the lambardar. The Court of first instance held that the defendant had been guilty of negligence and decreed the plaintiffs' claim on the basis of the gross rental. The lower appellate Court varied the decree of the Court below. In the course

of his judgment the learned District Judge says:

"The next point urged is that the profits should be calculated on actual collections and not on the recorded rentals as has been done by the lower Court. This plea, in my opinion must be allowed for in a suit under S 164, Ten. Act, profits must be allowed on actual collections, unless it is proved that the rents have remained uncollected owing to the negligence or misconduct of the lambardar. In this case as far as I can see, there is nothing to show that the rents were not collected through the negligence or misconduct of the defendant."

The Court of first instance had stated:

"The patwari further states that the amount of arrears is recoverable and the tenants are in a position to pay it. Accordingly on the plaintiffs application the defendant lambardar was examined. When he was asked to state the cause of such heavy arrears, he did not give any satisfactory cause. On the other hand he stated that he knew nothing at all, that he had no account book of collections and arrears, nor could he state what amount of money was realised from what tenant and what amount of money was in arrears. The burden of proof that the money which is due by the tenants remained in arrears owing to unavoidable circumstances, lay on the defendant. But he did not prove it. The statement of the defendant that he did not know anything at all proves that he had not made his statement in good faith."

It seems to us that if a cosharer gives general evidence to show that the rents are greatly in arrear, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the onus is shifted on to the defendant of showing that for some reason not connected with his own negligence or misconduct he was unable to collect the rents. It is very difficult to see what other evidence a cosharer under ordinary circumstances could give. This view was taken by a learned Judge of this Court in the case of *Mithan Lal v. Mizagi Lal* (1). In the present case the evidence of the lambardar, as pointed out by the Court of first instance, was extremely unsatisfactory. If the defendant knew nothing about the circumstances of the village he should have produced his karinda. There seems to be no dispute about the expenses. We think before finally disposing of the appeal, we should refer the following issue to the Court below:

"What rents for the years in suit were left unrealised and how much of these arrears were unrealised on account of the negligence or misconduct of the lambardar?"

We direct the Court below to order the lambardar (within a time to be speci-

fied in the order) to file an account showing the names of the tenants, the amounts that have been realised from each of the tenants, and the amounts left unrealised. In the case of rents unrealised the lambardar will give in a column of the account his reasons why these rents were not realised. When this account has been filed the plaintiffs will have a right to see the same, and they will then be entitled to go into evidence to show that in respect of the moneys not realised, the lambardar was guilty of negligence or misconduct. The lambardar will of course have a right to rebut the evidence, if any produced by the plaintiffs. The usual ten days will be allowed to file objections on return of the finding.

V.B./R.K.

Issue remitted.

A. I. R. 1915 Allahabad 331

CHAMIER, J.

Hira Lal and others—Applicants.

v.

Saraswati—Opposite Party.

Criminal Revn. Petn. No. 1229 of 1914, Decided on 5th May 1915, from order of Magistrate, Aligarh.

Copyright Act (3 of 1914), S. 7 (a)—Copyright did not include exclusive right of translation—Author is entitled to copyright in book translated by him.

Under the old Copyright Act "copyright" did not include the exclusive right of translation, but the author of a book who made a translation of it was entitled to a copyright in it as if it were an original work. [P 331 C 2 P 332 C 1]

E. A. Howard—for Applicant.

S K. Dar—for Opposite Party.

R. Malcomson—for the Crown.

Judgment—The applicants have been convicted of an offence under S. 7 (a), Copyright Act, 1911. Ajudhia Prasad wrote a book in Urdu called Translation Guide, Part I, and had it printed in 1897 by the applicants who are the owners of a press. He also wrote a Translation Guide, Part I, in Hindi but died before he could publish it. His widow, the complainant, had the new work printed and published by the applicants in 1911. Three years later the applicants published another edition of the Translation Guide in Hindi, but suppressed the name of the author and claimed to be the proprietors of it. For the applicants it is contended that the complainant had no copyright in the Hindi work. "Copyright" did not formerly include the exclusive right of translation,

but the author of a book who made a translation of it was entitled to a copyright in it as if it were an original work. Therefore even if the Hindi book in question is only a translation of the Urdu book, Ajudhia Prasad, and his widow after him, had copyright in the Hindi book. S. 4 of the Act of 1914 to which counsel has referred has no bearing upon the case. The application is dismissed.

V.J./R.K. *Application dismissed.*

A. I. R. 1915 Allahabad 332

RICHARDS, C. J. AND RAFIQUE, J.

Sital Prasad—Defendant—Appellant.

v.

Lal Bahadur and another—Plaintiffs—Respondents.

First Appeal No. 91 of 1914, Decided on 25th November 1915, from decision of Sub-Judge, Cawnpore.

Civil P. C. (5 of 1908), O 23, R. 3—Agreement of compromise in mutation case is not registrable and is admissible in other suit—Registration Act (16 of 1908), S. 17 (2) (6).

A petition filed in a mutation case in which the parties merely request the revenue Court to effect mutation of names in accordance with an agreement come to between the parties out of Court, is not compulsorily registrable and is admissible in evidence in a subsequent civil suit to prove the adjustment of a dispute between the parties out of Court. [P 333 C 2]

M. L. Agarwala and Benod Behari—for Appellant.

Karlas Nath Katju and Tej Bahadur Sapru—for Respondents.

Judgment—This appeal arises out of a suit in which one Lala Lal Bahadur claimed a declaration of his title to certain property which originally belonged to three brothers, Raja Lal, Ambika Prasad and Munna Lal. The plaintiff's claim was that he was the daughter's son of one Bhawani Sahai, the paternal grandfather of the three persons we have named. It appears that while this suit was pending, there were also pending in the revenue Court proceedings for mutation of names. The application for mutation, and the opposition thereto, were based on exactly the same considerations as in the civil suit. On 23rd October 1913 a petition was presented in the revenue matter signed by Lal Bahadur (plaintiff) and Sital Prasad (the contending defendant). This petition set forth that the revenue matter had been compromised in the manner set forth in the petition. The petition goes on to say that Lal Bahadur and Govind Prasad

had agreed to recognize that Sital Prasad had a right to three-fourths of the property in dispute as sapinda to Raja Lal and Munna Lal. The revenue Court acted on the petition and made entries accordingly. On 21st November 1913 the plaintiff presented a petition to the learned Judge before whom the present suit was pending, stating that the suit had been compromised and asking that a decree should be made under O. 23, R. 3, Civil P. C. He brought on to the file, the petition of 23rd October 1913, to which we have referred above. The defendant did not deny that he had joined in the petition, but said that he had done so as the result of fraud and undue influence. The Court below held that there was no fraud or undue influence and made a decree in the terms of the alleged adjustment.

In the present appeal it is urged that the petition, not being registered, was inadmissible having regard to the provision of S. 17, Registration Act, 16 of 1908. The respondent contends that the petition to the revenue Court was not a document that required registration and that it was admissible to prove that an adjustment of the civil suit had been made by the parties out of Court and that in, the absence of fraud, it demonstrated that there had been an adjustment. From time to time the admissibility of such petitions as evidence in subsequent proceedings in the civil Courts, has been raised and there is undoubtedly some conflict of authority. S. 17, Registration Act, (Cl. b), provides that

"nontestamentary instruments which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of Rs. 100 and upwards to or in immovable property"

must be registered. It has been argued that these petitions are instruments requiring registration within the meaning of the section, in most, if not in all, of the cases heretofore decided in which the question has arisen, the petition was presented to the revenue Court long before the civil Court proceedings were instituted. It may perhaps fairly be said that in some of these cases the party producing the petition of compromise, was attempting to use it for the purpose of showing that some right in immovable property had either been "created, declared, assigned, limited or extinguished." If in the present case, the respondent was seeking to use the petition

to show that a right in immovable property had been "created, declared, assigned, limited or extinguished," it might have been urged with great force that if the document "purported or operated" to do any one or more of these things, it was inadmissible for want of registration and that if it did not so "purport or operate" it was inadmissible as irrelevant. In the present case we think that the petition of 23rd October 1913 was produced in the Court below merely for the purpose of showing that this very suit had been adjusted by the parties out of Court. This is clearly shown by the petition which the plaintiff filed in the civil Court setting forth that there had been an adjustment. The petition of 23rd October does not on the face of it purport to "create, declare, assign, limit or extinguish any right." It was merely a request to the revenue Court to effect mutation of names in accordance with an agreement come to between the parties. The petition does not on the face of it even purport to be the agreement between the parties. It is simply a "petition" addressed to the Court. O. 23, R. 3, provides that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, the Court shall order such compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit.

Prior to the passing of the present Code, it had been the practice of this Court not to act under the corresponding S. 375, of the old Code, unless the parties were actually agreed that an adjustment had been made when the Court was asked to act. The other High Courts on the contrary had taken the view that it was open to one of the parties to prove the adjustment even when the other party denied it. The words of the present order seem to indicate that the legislature has thought well to adopt the practice prevailing in the other Courts and that the Court must now inquire whether or not there has been an adjustment out of Court. There was nothing to prevent the parties to the present suit coming to an oral agreement of adjustment. The only transactions relating to immovable property which require to be made in writing are those specified in the Transfer of Property Act.

If the parties had presented to the civil Court a petition in the same terms as that presented to the revenue Court, the civil Court would undoubtedly have received it and acted upon it. We do not think that any one could have contended that such a petition required registration. Suppose that both parties had signed such a petition and that on the strength of it the respondent had asked the Court to act under O. 23, R. 3, suppose further that the applicant had opposed the Court so acting on the ground that he had been induced to sign the petition by fraud and that the Court had found that there was no fraud, we think it clear that the Court would have been bound to make a decree in terms of the adjustment and that the applicant could not have successfully contended that the signed petition was inadmissible for want of registration. We think that the petition (which both parties signed) to the revenue Court was in the circumstances of the case admissible as evidence that the present suit had been adjusted out of Court. The significance to be attached to the evidence is of course another matter. In the present case, when we consider that the mutation proceedings and the civil Court suit were going on simultaneously, and that it was exactly the same dispute, it is clear that the present suit was adjusted. It is quite clear that the petition in the revenue matter was made in pursuance of the agreement to adjust the dispute pending between the parties. In the natural course of events, if Sital Prasad had kept good faith, he would have joined in a petition to the civil Judge couched in exactly the same terms as the petition he had joined in, to the revenue Court. We think that the Court below was justified in coming to the conclusion that the parties had adjusted the suit out of Court, and that being so, it was the duty of the learned Judge to make the decree in terms of that adjustment. We see no reason to differ from the view taken by the Court below on the question of undue influence and fraud, nor was it seriously urged that we should do so. We dismiss the appeal with costs including in this Court fees on the higher scale. The decree will not issue until the deficiency is made good by the plaintiff-respondent.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 334

RICHARDS, C. J. AND RAFIQUE, J.

Jahangir and another—Defendants—Appellants.

v

Sheoraj Singh—Plaintiff—Respondent.

Second Appeal No. 670 of 1914, Decided on 23rd June 1915, from decree of Dist. Judge, Moradabad.

(a) Evidence Act (1 of 1872), S. 32 (6)—S. 32 (6) does not require proof of author of old pedigree.

Neither S. 32, Evidence Act, nor its Cl. 6 provides that it is necessary to show who it was that made the statements referred to therein.

Where an old pedigree, which was found to be genuine, was made long before the question in dispute had arisen and it was impossible to show who in fact had made the statements contained in the pedigree:

Held: that the pedigree was admissible in evidence. [P 335 C 1]**(b) Practice—Evidence—Objection to admissibility of evidence must be raised when evidence tendered.**

The proper time to object to the admissibility of evidence is at the trial when the evidence is tendered and it is then that the Court should rule as to the admissibility or inadmissibility of the evidence. [P 334 C 1]

Surendra Nath Sen—for Appellants.*Nehal Chand* for B. E. O'Connor and A. H. C. Hamitation—for Respondent.**Judgment.**—This appeal arises out of a suit brought by the plaintiff for a declaration that a certain deed of gift made by one Mt. Sanjia in favour of the defendant should be held to be null and void after her death. The Court of first instance dismissed the plaintiff's suit. The lower appellate Court gave him a decree.

Having regard to the fact that this is a second appeal, the learned vakil on behalf of the defendant-appellant was bound to admit that the only question that could be argued, was the admissibility in evidence of a pedigree relied upon by the plaintiff, on the strength of which the lower appellate Court decreed the plaintiff's claim. Objection to the admissibility of evidence taken at a late stage in litigation is not to be encouraged. The proper time to object to the admissibility of evidence is at the trial when the evidence is tendered and it is then that the Court should rule as to the admissibility or inadmissibility of the evidence. When the objection is taken at the proper time, the party wishing to produce the evidence may be able to take steps to make the evidence admissible.

If the objection is not taken until a late stage in the litigation, it may mean that an appellate Court is obliged to decide against the party on a technical ground or the time of the Court is taken up in re-trying matters which ought to have been disposed of at the original hearing, the result being loss of public time and additional and unnecessary expense to the litigants.

The document in question is an alleged pedigree showing the relationship of a number of persons and amongst others of Hulas (the husband of Mt. Sanjia) with one Bhusa. The document, according to the finding of the Court below, was an ancient document and genuine. A witness of the name of Jiraj produced the document. It had been filed in mutation proceedings, the record of which case was sent for. Jiraj identified the document and stated that he had received it as a family pedigree from his grandfather. No objection appears to have been taken to the admissibility of this document in evidence in the Court of first instance, although its genuineness was not admitted. In the lower appellate Court it was objected to, on the ground that it was inadmissible because no evidence was adduced to show who had made it. We think that having regard to the stage at which objection as to the admissibility of the document is made, we should treat it as a document, produced by Jiraj who proved that he received it from his grandfather, as being a document which contained the particulars of the family relationship. We must also assume that the statements made by the witness Jiraj are true, they having been believed by the lower appellate Court. The question is whether under these circumstances the document is or is not admissible in evidence. S. 32, Evidence Act, provides that

"Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in certain cases."

Cl. 6 is as follows:

"When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tomb stone, family portrait, or other thing

on which such statements are usually made, and when such statement was made before the question in disputes was raised."

We assume for the purposes of our decision that it was impossible to show who in fact had made the statements contained in the pedigree, that the pedigree was made before the question in dispute had arisen and necessarily that it was impossible to call as witness the person who had made the material statements contained in the pedigree. The question is whether on these assumptions the document was admissible. We think that it was. Neither the section nor the clause provides that it is necessary to show who it was that made the statements. In the case of an old pedigree it would be generally quite impossible to give evidence as to who was the author of the statements. We may point out that in the present case we are not called upon to express any opinion as to the genuineness of the document, or the weight to be attached to the evidence. In our opinion the decision of the Court below was correct and ought to be affirmed. We accordingly dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 335 (1)

BANERJI AND RAFIQUE, JJ.

Ram Chand—Petitioner—Appellant.

v.

Gaya Din Tewari—Opposite Party—Respondent.

First Appeal No. 109 of 1915, Decided on 31st July 1915, from order of Judge, Agra, D/- 10th March 1915.

Civil P. C. (5 of 1908), S. 92—In suit under S. 92 person appointed trustee by compromise—Trustee adjudged insolvent—Application to remove him is not in continuation—Fresh suit lies.

In a suit under S. 92, Civil P. C. a compromise was effected by which one G was appointed manager of a temple. Subsequently G was declared insolvent and an application was made to the District Judge to remove him:

Held: that the suit having been decided and a decree made the application could not be in continuation of the suit and was therefore not entertainable.

Held: further that the remedy was a further suit under S. 92, Civil P. C. [P 335 C 2]

G. L. Agarwala—for Appellant.

Mohan Lal Sandal—for Respondent.

Judgment.—In our opinion the Court below is right. A suit was brought under S. 92, Civil P. C. for removal of certain trustees of a temple. The case

was compromised and a decree was made in accordance with the compromise, to the effect that Gaya Din should be the manager of the temple and Ram Chand should be the manager of the temple property. It is said that Gaya Din has been declared insolvent and accordingly an application was made to the District Judge to remove Gaya Din from his office of trustee. The learned Judge has, in our opinion, rightly held that no such application could be made in the Miscellaneous Department. If Gaya Din had committed any act which would entail his removal from the office of trustee, the remedy was a suit under S. 92, Civil P. C. but no application in the Miscellaneous Department could be made for his removal. The Court has no authority to entertain an application of this kind. The learned vakil for the appellant contends that the present application was in continuation of the suit which terminated in a compromise and decree. The suit having been decided and a decree made there could not be a continuance of the suit. The present application cannot be deemed to be an application for execution of the decree. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 335 (2)

RICHARDS, C. J. AND RAFIQUE, J.

Ram Sarup and others—Defendants—Appellants.

v.

Jaswant Rai and others—Plaintiffs—Respondents.

Privy Council Appeal No. 19 of 1915, Decided on 26th November 1915, for leave to appeal to His Majesty.

Limitation Act (9 of 1908), S. 12 and Art. 179—Copying days would be excluded in computing limitation for leave to appeal to Privy Council.

In computing the period of six months under Art. 176, Lim. Act, provided for an application for leave to appeal to His Majesty in Council, an applicant is entitled under S. 12, Cl. (2), Lim. Act, to exclude the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree.

Section 12 (2), Lim. Act, is general and applies to all applications for leave to appeal.

[P 336 C 1]

Gulzarulal and Karlas Nath Katju—for Appellants.

Benode Behari—for Respondents.

Judgment.—This is an application for leave to appeal to His Majesty in

council. A point has been taken on behalf of the respondent that the application was not presented within time. Art. 179, Lim. Act, prescribes a period of limitation of six months from the date of the decree. S. 12, Cl. (2), Lim. Act (now in force) provides that in computing the period of limitation prescribed for an application "for leave to appeal," the day on which the judgment complained of, was pronounced and the time requisite for obtaining a copy of the decree shall be excluded. It is admitted that if this provision applies to an application for leave to appeal to His Majesty in Council, the application is within time. Prior to the passing of the present Limitation Act, appeals to His Majesty had to be brought within six months from the date of the decree and the applicant was not at liberty to exclude any time for the purpose of obtaining a copy of the decree. Under the old Act, this time was only allowed to applications for leave to appeal as a pauper; but the clause of the section as it now stands is general and appears to apply to all applications for leave to appeal. It is highly probable that the words "leave to appeal as a pauper" were omitted so as to include applications for leave to appeal in insolvency matters. But in construing the section, we must deal with the section as it now stands. On the plain words of the section, an applicant for leave to appeal is entitled to exclude the period referred to. In our opinion, the application is within time.

The value of the subject-matter of the suit in the Court below and of the proposed appeal to His Majesty in Council is upwards of Rs. 10,000. This Court did not affirm the decision of the Court of first instance. The case accordingly fulfils the requirements of S. 110, Civil P. C. and we so certify. We make no order as to costs.

V.B./R.K. *Application granted.*

A. I. R. 1915 Allahabad 336

BANERJEE AND RAFIQUE, JJ.

Madho Ram and others—Decree-holders—Appellants.

v.

Nihal Singh and others—Judgment-debtors—Respondents.

Execution Second Appeal No. 1828 of 1914, Decided on 27th July 1915, from decision of Dist. Judge, Saharanpur.

(a) Limitation Act (9 of 1908), Art. 181—Art. 181 governs application under O. 34, R. 5, Civil P. C.—Time runs when right to apply accrues.

An application for an order absolute for sale under O. 34, R. 5, Civil P. C., is governed by Art. 181, Sch. I, Lim. Act, 1908, and the period of limitation should be computed from the time when the right to apply first accrued.

[P 337 C 2]

(b) Limitation Act (9 of 1908), Art. 181—Right to apply under O. 34, R. 5, begins after expiry of time allowed by first Court—No fresh starting point is given by appellate decrees confirming first Court's decree.

A preliminary decree under O. 34, R. 4, Civil P. C., was made on 27th February 1909. The decree allowed a period of six months to the judgment-debtor to pay the amount of the decree and that period expired on 26th August 1909. Meanwhile the judgment-debtor appealed. The decree was affirmed by the lower appellate Court on 25th January 1911 and by the High Court on 25th January 1912. The decree-holder applied on 25th April 1913 under O. 34, R. 5, for a decree absolute.

Held: that the application, having been made beyond three years from the date of the expiration of the period for payment, was barred by time under Art. 181, Sch. I, Lim. Act, 1908.

Held further: that the subsequent decrees by the appellate Courts only affirmed the right given by the Court of first instance and did not give rise to a fresh right unless the decree of the Court of first instance was in any respect varied by the appellate Courts. [P 337 C 2]

Durga Charan Banerjee and Surendra Nath Sen—for Appellants.

Nehal Chand—for Respondents.

Facts.—This was a decree-holder's appeal. The decree-holder obtained a decree for sale against the respondent on 27th February 1909. Before he could apply for an order absolute for sale under O. 34, R. 5, the judgment-debtor appealed to the District Judge who confirmed the decree of the first Court on 25th January 1911. He appealed to the High Court and the High Court too dismissed his appeal confirming the decrees of the two lower Courts on 25th January 1912. The decree-holder then applied for an order absolute on 25th April 1913. There was no extension of time for payment in either of the original decrees of the lower Courts. The first Court dismissed the application of the decree-holder as barred by time and the lower appellate Court on appeal upheld that order. The decree-holder appealed to the High Court.

Judgment.—This appeal arises out of an application made under O. 34, R. 5, Civil P. C., for a final decree in a suit for sale upon a mortgage. The preliminary decree under O. 34, R. 4, was made

on 27th February 1909. That decree allowed a period of six months to judgment-debtor to pay the amount of the decree, and that period expired on 26th August 1909. Meanwhile the judgment-debtor appealed, with the result that the decree of the Court of first instance was affirmed by the lower appellate Court on 25th January 1911, and on second appeal, by the High Court on 25th January 1912. Neither the first appellate Court nor this Court extended time for payment of the mortgage money. The present application was made on 25th April 1913.

It was contended on behalf of the judgment-debtors, that is, the mortgagors, that the application was beyond time. This contention was allowed by the Court of first instance and the decision of that Court was affirmed by the lower appellate Court. The decree-holders have preferred this appeal and it is urged on their behalf that limitation should be computed either from the date on which the decree of the Court of first instance was affirmed by the lower appellate Court or when the decree of this Court was made.

In order to consider whether the application is barred by limitation or not, it is first of all necessary to determine what article of Sch. 1, Lim. Act, is applicable to the present case. It is clear that Art. 182 does not apply, and there being no other article which is applicable, the only article which can be applied is Art. 181. R. 5, O. 34, provides that where payment is not made within the time fixed, the Court shall on application made in that behalf by the plaintiff pass the final decree for the sale of the mortgaged property or a sufficient part thereof. Therefore it is necessary that an application should be made by the plaintiff in order to obtain a final decree under that order. The application is thus an application in the suit and since the passing of the present Civil Procedure Code it can no longer be said to be an application in execution or for the execution of a decree. It is therefore manifest that Art. 182 cannot apply and as stated above, since there is no other article which is applicable, the only article which would govern an application of this kind would be Art. 181. This has been held by the Bombay High Court in *Datto Atmaram Hasabnis v. Shankar*

Dattatraya (1), following the decision of Jenkins, C. J., in *Amolak Chand Parak v. Sharat Chandra Mukherjee* (2).

Under the old Limitation Act also it was held by this Court in *Ali Ahmad v. Naziran Bibi* (3), and *Udit Narain v. Jagannah* (4), that an application for an order absolute for sale under the Transfer of Property Act was governed by Art. 178, Lim. Act, 1877, which corresponds to Art. 181 of the present Act. The next question to be considered is: When did the right to apply accrue as provided in Col. 3 of that article? There can be no doubt that after the expiry of the six months allowed by the decree of the Court of first instance, the decree-holders, plaintiffs became entitled to apply for final decree. The mere fact that an appeal was preferred from the preliminary decree did not take away that right or postpone it. This is conceded by the learned vakil for the appellants, but he urges that he also acquired the right to apply when the decrees of the appellate Courts, namely, that of the first Court of appeal and of the High Court were passed.

It seems to us that limitation should be computed from the time when the right to apply first accrued. That right accrued, as we have said above, when the six months granted by the Court of first instance to the judgment-debtors expired. The passing of the subsequent decrees by the appellate Courts only affirmed that right and did not give rise to a fresh right, unless the decree of the Court of first instance was in any respect varied by the appellate Courts. We think that the analogy of the decision of the majority of the Full Bench in *Gayal Din v. Jhumman Lal* (5) applies. That was a case in which the question was, whether the money sought to be recovered became due under Art. 132, Sch. 1, when default was first made in the payment of instalments. It was held that the money became due when the first default was made. On the same principle limitation must be computed, in a case like the present, from the time when the plaintiff's right to make an application for a final decree first accrued.

(1) A. I. R. 1914 Bom. 263=38 Bom. 32=21 I. C. 318.

(2) [1911] 38 Cal. 913=11 I. C. 943.

(3) [1902] 24 All. 542=(1902) A. W. N. 160.

(4) [1904] 1 A. L. J. 15.

(5) [1915] 37 All. 400=28 I. C. 910.

Admittedly the right first accrued in this case on 26th August 1909, and more than three years having expired from that date when the present application was made, it is beyond time. We accordingly dismiss the appeal with costs, including fees on the higher scale.

V.R./R.K. *Appeal dismissed.*

A. I. R. 1915 Allahabad 338

PIGGOTT, J.

Ali Jafar—Plaintiff—Appellant.

v.

Phulmanta Koer and others—Defendants—Respondents,

Second Appeal No. 1060 of 1914, Decided on 19th June 1915, from decree of Dist Judge, Azamgarh.

Agra Tenancy Act (2 of 1901), Ss. 4 (5) and 167—Suit for ejectment as trespassers or declaration of defendants being tenant is cognizable by civil Court—Civil Court can declare tenancy but not its class

The plaintiff sued the defendants in the civil Court for ejectment upon the allegation that whatever the defendants might once have been they were now in wrongful possession of the land as trespassers. The plaintiff further claimed as an alternative relief that if it be found that the defendants were holding as tenants, a declaration might be given to that effect.

Held, that the suit was maintainable in civil Court and that the civil Court had jurisdiction to give a declaration as to the existence or non-existence of tenancy but not as to the class of tenancy. [P 339 C 1]

S. M. Sularman—for Appellant.

Parmeshwar Dayal—for Respondents.

Judgment.—This appeal raises a question of jurisdiction depending mainly on the pleadings of the parties. The plaintiff alleges that he is the proprietor of certain land and that the defendants were in possession of the same as cultivators, but never had any proprietary right therein. In the course of certain settlement proceedings the plaintiff tried to get an enhanced rent determined as payable by the defendants, and the defendants defeated his claim before the settlement Court by pleading that they were in possession as proprietors. The plaintiff alleges that, whatever the defendants may once have been, they are now in wrongful possession of this land as trespassers. On this allegation he sues in the civil Court for their ejectment. At the same time he claims an alternative relief; he says that, if it be found that the defendants are holding as tenants of the land in suit, the Court may make a declaration to that effect.

I think the suit is maintainable. It has been thrown out by both the Courts below, the lower appellate Court relying on the decision of *Ram Sukh v. Gokul Chand* (1). Another case referred to in support of the decision of the Courts below is that of *Narain Singh v. Gobind Ram* (2). I think it may be conceded at once to the respondents that the mere fact that a tenant denies the existence of a tenancy and claims title in himself does not ipso facto terminate the tenancy. If the Court, in going into the issues of fact raised by the pleadings in this case, were to find that the defendants at one time held this land as the tenants of the plaintiff, it would probably also find that they did not cease to be tenants merely because they set up title in themselves. These considerations however seem to me by no means decisive as to the maintainability of the suit. Prima facie the plaintiff is suing to eject trespassers from his land, which he has a right to do in a civil Court.

In the alternative, he says that he is a person with a proprietary title to the land in suit upon which a cloud has been cast by the action of the defendants, and he asks the Court to make that title clear. Prima facie such a suit is maintainable under S. 42, Specific Relief Act. The question is whether this suit is barred by the provisions of S. 167, Agra Tenancy Act (Local Act 2 of 1901). As was rightly laid down in the case on which the lower appellate Court has relied, so long as the provisions of the Tenancy Act are available to give a plaintiff the relief sought by him the suit must be filed in the revenue Court, and the jurisdiction of the civil Court cannot be invoked to determine any dispute or matter in respect of which a suit or application under the Tenancy Act, might be brought or made. With regard to the first relief sought, the suggestion for the respondents is that the plaintiff might obtain appropriate relief by moving the revenue Court to eject the defendants as tenants, and with regard to both the reliefs sought, it is suggested that the plaintiff could obtain appropriate relief by suing for a declaration under S. 95, Cls. (b) and (c) of the same Act.

(1) [1899] 21 All. 148=(1898) A. W. N. 213.

(2) [1911] 33 All. 522=9 I. C. 1022.

It is clear from the written statement put in by the defendants in this case that any such suit on the part of the plaintiff in the revenue Court would be resisted by the defendants on the allegation that they were in proprietary possession of the land in suit. The question whether there is or is not tenancy in existence between the parties calls for determination in some Court or other. Strictly speaking, on the pleadings as they stand in the case now before me, the existence of a tenancy is denied by both parties. The plaintiff says that, whatever they may once have been, the defendants are now mere trespassers. The defendants say that they are in possession as rightful owners. It is conceivable that the Court, after trying out the issues of fact, and examining the evidence produced by both parties, might come to the conclusion that the plaintiff's allegations as to the determination of the tenancy were based upon an error of law and that, as a matter of fact, the defendants were in possession as tenants. If so, I think, the plaintiff is entitled to a declaration. The case is not covered by S. 95, Cl. (b), Tenancy Act, which refers back to S. 6 of the same Act in which the different classes of tenants are specified. In any declaration which the Court may make it should certainly be careful not to trespass on the jurisdiction of the revenue Court by declaring the class of tenancy but I think it is competent to give a declaration as to the existence or non-existence of a tenancy in accordance with the definition of a tenant in Cl. (5), S. 4, Tenancy Act. There is plenty of case law on the side of the plaintiff. I may refer to the case of *Zubeda Bibi v. Sheo Charan* (3) and *Chauharya Singh v. Sarabjit* (4). See also on the question of a declaration the case of *Rayaslam v. Moti Begam* (5), decided on 20th June 1907.

For these reasons I set aside the decision of the Courts below dismissing the suit and remand the case through the lower appellate Court to the Court of first instance for trial on the merits. Costs of this appeal will be costs in the cause.
V.B./R.K. Appeal decreed, Case remanded.

A. I. R. 1915 Allahabad 339

CHAMIER AND PIGGOTT, JJ.

Janak Singh—Defendant—Appellant.
v.

Walidad Khan and another—Plaintiffs—Respondents.

Second Appeal No. 144 of 1914, Decided on 14th May 1915, from decree of Dist. Judge, Farrukabad, D/- 3rd November 1913.

Limitation Act (9 of 1908), Arts. 62, 97 and 116—Suit for recovery of purchase money by purchaser whose name mutated but who never came in possession and whose vendee's title was disproved—Sale deed stipulating for return of money on dispossession by real owner is governed by either Art. 62 or Art. 97 but not by Art. 116.

The plaintiffs purchased certain property on 17th November 1905 and got mutation of names effected in their favour on 7th February 1906. The sale deed contained a recital that the vendor had placed the purchasers in possession and if the purchasers were disturbed or dispossessed by any person proving himself to be entitled to the property, they would be entitled to recover from the vendor the price paid by them for the property. But the purchasers did not obtain possession in fact of the property. In 1907, certain persons brought a suit against the vendor and the purchasers to have the sale set aside and obtained a decree which was finally upheld by the High Court on 28th May 1909. The plaintiffs instituted the present suit for the recovery of the purchase money on 1st April 1911.

Held, that the suit was not governed by Art. 116, Sch. 1, Limit. Act, 1908, but was governed either by Art. 62 or Art. 97 of the Act, and was barred by time [P 340 C 2]

Gulzari Lal—for Appellant.

Surendro Nath Sen—for Respondents.

Judgment.—On 17th November 1905, the respondents purchased a share in a zamindari village from the appellant. The sale-deed contained a recital that the vendor had placed the purchasers in possession of the property and an undertaking that the vendor would cause mutation of names to be effected in favour of the purchasers. It also contained a provision to the effect that if the purchasers were disturbed or dispossessed by any person proving himself to be entitled to the property they would be entitled to recover from the vendor the price paid by them for the property. Mutation of names appears to have been effected in favour of the purchasers on 7th February 1906. But it is clear that they did not obtain possession in fact of the share. In 1907 Mahbub Khan and others brought a suit against the vendor and the purchasers to have the sale deed set aside and for a declaration of

(3) [1900] 22 All. 83=(1899) A. W. N. 189.

(4) [1912] 15 I. C. 303.

(5) [1907] 4 A. L. J. 253 (Notes).

their title to the property. Their claim was decreed in July 1907. The present respondents appealed to the District Court. Their appeal was dismissed and they filed a second appeal in this Court which was dismissed on 28th May 1909. The present suit was instituted on 18th April 1911. The question for decision in this appeal is whether the suit was brought within time. The respondents' contention is that the suit is within time, (1) because it is governed by Art. 116, Sch. 1, Lim. Act, and (2) because, if Art. 97 be held to be applicable, time did not begin to run against them until their appeal to this Court was dismissed in May 1909, less than three years before the present suit was brought. It seems to us quite clear that Art. 116 does not apply to the present suit. That article provides for a suit for compensation for the breach of a contract in writing registered. The respondents contend that the deed of sale contains a contract on the part of the vendor to put the purchasers in possession. The sale deed however contains no such contract. As already stated it recites as a fact, though it was not a fact, that the vendor had placed the purchasers in possession. The other provision contained in the deed, to the effect that the purchasers would be entitled to recover the price paid by them, in case they were disturbed or dispossessed by persons proving themselves entitled to the property, does not apply because the purchasers never did get possession.

The lower appellate Court seems to have been of opinion that the purchasers might be regarded as having obtained possession of the property because mutation of names was effected in their favour. It relies upon S. 201, Tenancy Act, Local Act 2 of 1901, as showing that the respondents, as the recorded proprietors of the share purchased, could have sued for the profits of that share in the revenue Court. It does not appear however that they ever brought a suit for profits. They certainly did not obtain a decree for profits of the share, and as a matter of fact Mahbub Khan and others who had been in possession of the property for many years prior to the sale in question retained possession and were content to bring a suit for declaration of their title. They were under no necessity to bring a suit

for possession. It is therefore quite clear that the purchasers never did get possession of the share. We are therefore of opinion that Art. 116, Sch. 1, Lim. Act, does not govern this case. The case appears to us to be governed either by Art. 62 or Art. 97 of the same Schedule. In all probability there was a total failure of consideration from the very beginning. If so, the suit is barred by limitation under Art. 62. But even if there was not an initial failure of consideration, the consideration must have failed very soon afterwards, certainly more than three years before the present suit was brought. More than three years before the suit the respondents failed to get possession of the property and were sued by Mahbub Khan and others, who had been in possession for many years. In our opinion whether Art. 62 or Art. 97 applies, the suit is barred by limitation. The purchase was clearly a speculative purchase of property for the purpose of endeavouring to oust persons who had been in possession of the property for many years. We allow this appeal, set aside the decrees of the Courts below and dismiss the suit of the respondents with costs in all three Courts. Costs in this Court will include fees on the higher scale.

V.E./R.K.

Appeal decreed.

A. I R 1915 Allahabad 340

RICHARDS, C. J. AND RAFIQUE, J.

Har Narain and others—Defendants—Appellants.

v.

Bishambhar Nath and others—Plaintiffs—Respondents.

First Appeal No. 283 of 1913, Decided on 29th November 1915, from decree of Sub-Judge, Agra, 1/- 24th June 1913.

Hindu Law—Partition—Step-mother entitled to share equal to son under Mitakshara.

According to the Mitakshara School of Hindu law a step-mother is entitled to a share equal to that of a son upon partition [P 341 C 1]

Benode Behari—for Appellants.

Sham Krishna Dar—for Respondents.

Judgment.—This appeal is connected with First Appeal No. 355 of 1914. It is a suit for partition brought by Bishambhar Nath and Mt. Chiraunji against Har Narain and his son Amba Prasad. Bishambhar Nath is the brother of Har Narain. Mt. Chiraunji is the mother of Bishambhar Nath and step-mother of

Har Narain. The only point which arises in the appeal is the share to which Mt. Chiraunji is entitled upon partition. The defendants contend that she is only entitled to a share out of the share allotted on partition to her son. On the other hand, the plaintiffs contend that the property must be divided into three parts, one part should be allotted to Bishambhar Nath, one part to Mt. Chiraunji and a third part to Har Narain. The Court below has acceded to the contention of the plaintiffs. The defendants have appealed. Reliance was placed on the case, *Hemangini Dasi v. Kedar Nath Kundu Chowdhury* (1). This no doubt would be an authority in the appellants' favour if the present was a case governed by the Benares School of law (i. e. Mitakshara), but it is quite clear that the case cited was one under the Bengal School of law, namely, the Dayabhaga. This appears from the judgment in the case of *Chowdhury Thakur Prashad Shah v. Mt. Bhagwati Koer* (2). On the other hand, there are several authorities in favour of the plaintiff which refer to the Mitakshara School of law: see *Damoodur Misser v. Senabuttu Misra* (3), *Damodar Das Maneklal v. Uttamram Maneklal* (4). The same point was expressly decided by this Court in the case of *Mathura Prasad v. Deeka* (5). In our opinion, the view taken by the Court below was correct and should be affirmed. We dismiss the appeal with costs including in this Court fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

- (1) [1889] 16 Cal. 758=16 I. A. 115=5 Sar. 374 (P. C.)
- (2) [1905] 1 C. L. J. 142.
- (3) [1892] 8 Cal. 537=10 C. L. R. 401.
- (4) [1893] 17 Bom. 271.
- (5) [1890] A. W. N. 124.

A. I. R. 1915 Allahabad 341

KNOX, J.

Satnarain Dube — Plaintiff — Appellant.

v.

Narain Bargah and others—Defendants—Respondents.

Second Appeal No. 1261 of 1914, Decided on 16th July 1915, from decree of Addl. Sub-Judge, Gorakhpur.

Evidence Act (1 of 1872), S. 77—Copy of dakhnama is admissible.

A dakhnama is a document forming record of the act of public officer and therefore its copy is admissible in evidence without proof: 25 I. C. 529, *Foll.* [P 341 C 2]

Iswar Saran — for Appellant.

Sunder Lal and S. M. Mir—for Respondents.

Judgment.—As the lower appellate Court observed, the chief point to be decided is whether the plaintiff has proved delivery of possession in his favour. In support of the fact that he had received delivery of such possession he produced a duly certified copy of a dakhnama. That copy was admitted and by order of the Court of first instance placed upon the record. Afterwards it was returned, but no reason appears upon the document as to why it should have been returned. The lower appellate Court held that the copy of the dakhnama was not admissible in evidence without proof of due execution. It accordingly refused to consider it. It further held that if it were admissible in evidence the plaintiff had not succeeded in proving delivery of possession in his favour. The reason why it so held is that the dakhnama contained only an admission of the plaintiff and no person is allowed to prove his own admission. As the plaintiff had not in the opinion of the lower appellate Court succeeded in proving that delivery of possession was made in his favour on 5th March 1909 it dismissed the appeal with costs.

The plaintiff comes here in appeal and takes the plea that the dakhnama is admissible in evidence and proves the plaintiff's allegation. In support of this contention reliance is placed upon the case of *Muhammad Nasir v. Ram Karan Singh* (1). In this case my brother Rafique held that as the dakhnama is a public document, its copy is admissible in evidence without proof. I also am of the same opinion. The dakhnama is a document forming record of the act of a public officer (executive), viz., the amin of the Court and that being so, a copy is admissible in evidence. As the lower appellate Court has decided the appeal on a preliminary point, I reverse the decree upon this point. I direct that the appeal be returned to that Court with instructions to place it upon its file of pending appeals and to determine it according to law. The Court will receive in evidence the copy of the dakhnama quantum valebat. This will not prevent the lower appellate

(1) A. I. R. [1914] All. 45=25 I. C. 529.

Court from exercising the discretion given it under O. 41, R. 27. Costs will abide the event.

V.B./H.K.

Appeal allowed.

A. I. R. 1915 Allahabad 342

TUDBALL, J.

Lachmi Narain—Plaintiff—Appellant.

v.

Ram Sarup and another—Defendants—Respondents.

Second Appeal No. 1143 of 1914, Decided on 17th June 1915, from decree of Addl. Sub-Judge, Bareilly.

Easements Act (5 of 1882), S. 33—Division of water route by servient owner is not obstruction.

The right of a dominant owner to pass his water across the servient owner's land is not interfered with if the servient owner diverts the direction of the route of water on his own land. [P 342 C 2]

Girdharilal Agarwala—for Appellant.

Surendro Nath Sen—for Respondents.

Judgment.—This is a plaintiff's appeal which arises out of a suit brought by him in an attempt to maintain his right of easement. The map filed with the plaint will explain the case. The plaintiff's case was that there was a hole in the wall between his compound and the compound of the defendants, that through this hole the rain water which fell in his compound and also the rain water which came from the roof of the house of one Muhammad Raza Khan daily and also the dirty water used in his house used to flow through the mohri A on to the defendants' land and thence to the public drain which runs in front of defendants' house, that this easement had been in existence for many many years and that shortly before the suit the defendants had blocked up the hole with stones and bricks and thus prevented the flow both of the daily water and the rain water. The defendants denied that they had blocked up this hole in the wall or that they had blocked up any drain. They admitted that the plaintiff had a right to drain off all rain water from his compound through this hole across the defendants' land to the public drain. This right they did not for an instant contest; but they contested the plaintiff's right to send his dirty "domestic" water through that hole on to their land. This they said had never

come through the mohri A. According to the written statement of the defendants the drain is still in existence now as it used to be. But it will be remembered that it was the plaintiff's case that the drain ran straight from mohri A in a straight line across the compound of the defendants and so on to the public drain. The presiding officer of the Court below apparently inspected the locality. He found that the drain did not run straight across the compound and that where, according to the plaintiff, the old drain used to run across the compound the defendants had built a cowshed and that the drain had now taken a circuitous route instead of a direct route across the compound.

The Court below held that there was no doubt whatsoever that the plaintiff had passed not only the rain water from the house but also dirty water after domestic use through this drain and had done so regularly. It refused to accept the evidence of the defendants' witnesses which was to the opposite effect. But it came to a curious conclusion. It held that because some eight or ten years ago the defendants had built their cowshed and had diverted the course of the drain across their compound, this was an obstruction to the exercise by the plaintiff of his right and that as this occurred more than two years before the suit the plaintiff failed to show that he had exercised his right peaceably and without obstruction up to a date within two years of the suit. As to the rain water the plaintiff's case was decreed, as to the passage of soiled water the plaintiff's claim was dismissed. The plaintiff comes here on second appeal. The point taken is that the mere diversion of the drain across the defendants' land is not an obstruction to the exercise, by the plaintiff, of the right which he claims. The right which the plaintiff claims is clearly right to pass his water, both soiled and rain water, through the mohri A across the defendants' land to the public drain. The fact that the defendants diverted the direction of the old route taken by the water in former days and now pass it by another route does not in my opinion, constitute an obstruction to the exercise of the plaintiff's right at all. The plaintiff's right to flow water, both dirty and rain water through the mohri A on to the defendants' land was not ob-

structed by the drain being diverted. It was immaterial to the plaintiff whether the defendants built the drain all round their compound or in a zigzag course so long as his right to pass water through the drain was not interfered with. Because the defendants have slightly altered the course of the drain it is impossible to say that the plaintiff's right has in any way been interfered with. The obstruction of which the plaintiff complained was an obstruction created within a period of six months before suit by the blocking up of the mohri A with bricks and stones. This the defendants totally denied having done. They do not claim a right to do so. The plaintiff claimed an injunction against the defendants ordering them to remove all obstructions from the mohri A and to leave it open and clear, so that both rain water and daily waste water might flow through it without hindrance and forbidding them ever to block it again and that a perpetual injunction might be issued against them restraining them from ever closing the aforesaid mohri and preventing the flow of daily waste water there through. The plaintiff's claim in regard to rain water has been decreed. He is equally entitled to a decree in respect of the daily waste water. I therefore order that, in addition to the decree already passed in his favour he will have a decree declaring him entitled to pass his daily waste water through the mohri A on to the defendants' land and a perpetual injunction as against the defendants restraining them from blocking up the mohri A or in any way obstructing the plaintiff in passing his rain water as well as daily waste water through that mohri across the defendants' land to the public drain. The plaintiff will have his costs in all Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1915 Allahabad 343**

RICHARDS, C. J. AND BANERJI, J.

Mukha and another—Plaintiffs—Appellants.

v.

Qabza and others—Defendants—Respondents.

Second Appeal No. 1177 of 1914, Decided on 12th November 1915, from decision of Addl. Dist. Judge, Saharanpur, D/- 6th June 1914.

Hindu Law — Succession — Grandfather's daughter's daughter's son is bandhu.

A grandfather's daughter's daughter's son is a bandhu ex parte paterna. [P 343 C 2]

C. C. Dillon and Damodar Das — for Appellants.

Nehal Chand—for Respondents.

Judgment.—This appeal arises out of a suit which was brought to realize the amount of a mortgage, dated 7th February 1910. The mortgage was made by one Mt. Thakuri, the widow of Pat Ram. The defendants to the suit were Qabza, Dalla, Rasalu and Mt. Parsanni. Mt. Parsanni and Rasalu were pro forma defendants, vendors of the defendants Qabza and Dalla. The defence was that there was no legal necessity. The plaintiffs replied that there was legal necessity and that even if there was no legal necessity, the defendants claiming under Rasalu had no locus standi to contest the legality of the mortgage, in that Rasalu had no right of inheritance to the estate of Pat Ram, the husband of Mt. Thakuri. The Court below has decreed the suit in part. It has held that there was legal necessity to the extent of Rs. 498-8-0, principal and interest. Two appeals have been preferred. The plaintiffs have appealed in regard to so much of their suit as was dismissed, whilst the defendant Qabza contends that legal necessity for no part of the mortgage money was proved.

We shall first deal with the question of necessity. The evidence consisted of the proof that there had been a previous debt incurred by Mt. Thakuri, but there is no evidence to show that there was any necessity for the incurring of this previous debt. In our opinion under these circumstances legal necessity was not proved.

The second question, namely, whether the defendants had any locus standi to contest the validity of the mortgage depends upon whether or not Rasalu was a reversioner or otherwise entitled to succeed to the property. Rasalu according to the findings of the Court below was the daughter's daughter's son of the grandfather of Pat Ram. According to Sarbadhikary's Tagore Law Lectures for 1882, p. 701, a grandfather's daughter's daughter's son is a bandhu ex parte paterna, and we think that he is bandhu. Under these circumstances, the defendant Qabza is entitled to contest the validity of the mortgage.

It was contended that Qabza who claimed under Rasalu could not contest the validity of the mortgage on one other ground, namely, that Rasalu took a sale-deed from Mt Thakuri of a portion of the estate of Pat Ram and therefore was estopped from denying that she was not entitled to all Pat Ram's estate. We do not agree with this contention. The property purchased by Rasalu from Mt. Thakuri was not the same as is now in dispute. Under these circumstances, it seems to us that the appeal fails and must be dismissed. We accordingly dismiss the appeal with costs, including in this Court fees on the higher scale.

V.B./R.K.

*Appeal dismissed.***A I. R. 1915 Allahabad 344 (1)**

BANERJI AND RAFIQUE, JJ.

Ganga Prasad Rai—Defendant—Appellant.

v.

Ramanand Gu — Plaintiff — Respondent.

Second Appeal No 706 of 1914, Decided on 27th July 1915, from decision of Sub-Judge, Ghazipur, D/- 10th February 1914.

Civil P. C. (5 of 1908), O 7, R. 10—Re-presentation after return of plaint is continuance of suit—Re-presentation after limitation does not bar suit.

A plaint which had been presented within time was returned to be re-presented to the proper Court. It was re-presented in accordance with the order of the Court but after the limitation for the original suit had expired.

Held that the re-presentation was a continuance of the suit and therefore the suit was not barred by limitation. [P 344 C 1]

M. L. Agarwala—for Appellant.

Lakshmi Narayan and S P Ghose — for Respondent.

Judgment.—The first point raised in this and the connected Appeal No. 707 of 1914 is that the suit was barred by limitation. It appears that the plaint was presented within time, but the Court of first instance ordered it to be returned and then it was re-presented in accordance with the decision of the Court, which was affirmed by the appellate Court. In our opinion the re-presentation of the plaint was a continuance of the suit and therefore no question of limitation arises. Upon the merits of the case the findings of the Court below are conclusive against the appellant. The lower appellate Court says in its judgment that:

"the oral evidence does not satisfactorily prove that the money borrowed was really spent on the repairs, or that the repairs were quite necessary for the preservation of the mutt building."

This is a finding of fact which must be accepted in second appeal. The result is that the appeal fails and is dismissed with costs, including fees on the higher scale.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1915 Allahabad 344 (2)**

RICHARDS, C. J AND RAFIQUE, J.

Kalyan Singh and others — Decree-holders—Appellants

v.

Jagan Prasad — Judgment-debtor — Respondent.

Letters Patent Appeal No. 15 of 1915, Decided on 19th June 1915, from decision of Chamier, J., reported in *A. I. R.* 1915 *All.* 105.

Civil P. C. (5 of 1908), S. 11 (4)—S. 11 (4) is not applicable to execution proceedings.

The provisions of the Code of Civil Procedure as to res judicata are not expressly made applicable to execution proceedings.

If it is ever considered expedient to make all the provisions of S. 11, of the Code applicable to execution proceedings, it should be done by the legislature, not by the Judges.

If a judgment debtor does not take exception to the amount set forth as being due in an application for execution, he is not prevented by the rule of res judicata from ever afterwards raising the question. [P 345 C 1, 2]

Durga Charan Banerji — for Appellants.

Kailas Nath Katju — for Respondent.

Judgment.—This appeal arises out of an application for execution. The original decree was for Rs. 20,200 with proportionate costs and future interest at 6 per cent per annum. It is now admitted that under the terms of the decree the decree-holder was only entitled to interest on the principal sum and not upon the costs. From time to time the decree-holder applied for execution. In the account of what he alleged to be due to him he included interest not only on the decretal amount but also on the costs. At last the situation was as follows: If the decree-holder was not to get interest on his costs the decree was more than satisfied. If on the other hand, he was to get interest upon his costs there would still remain something due to him. The sole question which has to be decided in the appeal is whether or not the judgment debtor having neglected to

take exception to the inclusion in the account of interest on cost, he is now prevented from saying that the decree is satisfied. The principle which the decree-holder seeks to set up is that of *res judicata*. The law of *res judicata* appears in S. 11, Civil P. C. It provides that:

"no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Explanation 4 provides that:

"any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

It seems quite clear that the provisions of the Code as to *res judicata* are not expressly made applicable to execution proceedings. It is said however that there are numerous authorities in which the principle of *res judicata* has been applied to execution proceedings. No authority has been shown to us where it has been decided that if a judgment-debtor does not take exception to the amount set forth as being due in an application for execution, he is prevented by the rule of *res judicata* from ever afterwards raising the question. To hold that he was, would not only be applying the rule of *res judicata* in a way not provided for by the Code but would be also seriously extending the authorities cited. In the present case the question as to how far the decree remained unsatisfied was never raised or decided. It is only by calling to his aid Expl. 4 that the decree holder can contend that the question has already been decided. The judgment-debtor had very little reason for taking exception to the earlier applications for execution. A large sum was then due on the decree and he knew that his property must be attached and sold in order to realize what was beyond question due. The judgment-debtor could not well take exception to the application for execution without employing a pleader and incurring expense. When the decree was practically satisfied, the question as to how much (if any) remained due for the first time became really important. If it is considered expedient (we do not say it is) to make all

the provisions of S. 11 of the Code applicable to execution proceedings, it should be done by the legislature and not by the Judges. We think that the view taken by the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

V.B./R.X.

Appeal dismissed.

A. I. R. 1915 Allahabad 345

KNOX, J.

Kidha Singh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 750 of 1915, Decided on 10th November 1915, from order of Addl. Sess. Judge, Moradabad.

Criminal P. C. (5 of 1898), Ss 195 and 476—All that is required is proof of prima facie case.

All that a Court granting sanction to prosecute under Ss. 195 and 476, Criminal P. C., for offences made punishable thereby, has to see is that a *prima facie* case has been made out upon the evidence before it for inquiring further into the question whether any of the offences punishable as set out in S. 195, has or has not been made out. [P 346 C 2]

C. Dillon—for Appellant.

Judgment.—This is an appeal against an order of the Additional Sessions Judge of Moradabad, whereby he has granted sanction for the prosecution of one Kidha Singh under S. 193 or S. 465/114, I. P. C. With reference to the prosecution, the learned Judge has in his judgment said :

"In this case alternative charges under S. 193, I. P. C., and S. 465/114, I. P. C., may have to be framed. If the receipt was really written the same day as he sold the bullock, it was not written on 9th December, the date it bears. Signing the receipt was fabricating false evidence or forgery."

The ground on which I am asked to interfere in appeal with this order of sanction is:

"because the evidence given by the appellants on behalf of Jahana was inconclusive, and even if believed, was insufficient to secure his acquittal. It would be impossible to prove that their statements were demonstrably false, and there would, in consequence, be no conviction."

I was referred in the course of the argument to what was said regarding this evidence by the Court before which the evidence was given. It appears that Jahana was on his trial for murder. He set up an alibi and in support of the alibi he secured the attendance amongst other persons of Kidha Singh. The alibi was to the effect that on the day in question, Kidha Singh along with Jahana

was at a place called Phina and that he there purchased a bullock. The murder was committed at Dayalwala. The two places are far apart, and the argument is on the one side that Jahana could not have been on the day in question at Phina and then subsequently at Dayalwala. The argument on the other side is that it was possible even on the evidence, for Jahana to have caught a train and by means of that train to have arrived at Dayalwala just in time to commit the murder. Regarding this evidence, the learned Judge says :

"The sale of the bullock was not registered or reported at the thana and the receipt may well have been written long after 9th December. Even if Jahana ever did buy a bullock from Kidha Singh which I very much doubt there is no guarantee that the witnesses have not rolled up an old transaction that took place months ago and merely changed the dates. It is admitted that bullocks of the kind that Jahana says he wanted, can be got in many places in the district very much less remote than Phina, and it does not seem likely that Jahana and his friend would have wandered all over the district for a week and spent a lot of money in tonga and railway fares in order to buy a Rs. 65 bullock. In face of the overwhelming evidence on the other side to prove that Jahana was at Dayalwala on 9th December, I am quite unable to attach the slightest weight to this alibi and the evidence called to support it."

The argument addressed to me is that sanction ought not to be granted when the evidence before the Court granting the sanction is such that the probable result will be acquittal. Scandal is caused if a prosecution of this nature results in acquittal. These arguments are based upon certain cases of the Calcutta High Court, namely, *Ram Prosad Malla v. Raghubar Malla* (1) and *Jadunandan Singh v. Emperor* (2). With all due respect to the learned Judges who arrived at that conclusion, I find myself unable to agree with it. I cannot find either in S. 195, Criminal P. C., or in S. 476 of the same Code any phrase which would lead to this result. Reading the two sections together and having regard to para. (4) in S. 195 and the words in S. 476, Criminal P. C.,

"when any criminal Court is of opinion that there is ground for inquiring into an offence referred to in S. 195, such Court after making such preliminary inquiry as may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the First Class;"

In my opinion, all that a Court granting sanction has to see is that a *prima facie*

case has been made out upon the evidence before it for inquiring further into the question whether or no any of the offences punishable as set out in S. 195, Criminal P. C., has or has not been made out. That question is still under inquiry. It is open to both sides to produce further evidence in support of or against it. In the present case, I do not pronounce any opinion on the value of the evidence which is on the record. I can quite see that the prosecution may be able to prove for instance that the train which left that day left at such a time and hour as to render it impossible for Jahana to have arrived at Dayalwala at the time mentioned. That by no means limits the possibility of what the prosecution may be able to put forward.

It often happens that in this country cases are started for the first time and without any warning to the prosecution of the nature of the evidence which the defence is about to put forward. Several cases by the late Straight, J., when he first came to this Court show how struck he was with this matter. Again the defence may be well able to show that Jahana left Phina at such a time as to enable him to reach Dayalwala before the murder was committed. All this is to be inquired into. When we have one learned Judge stating the result of his view that the evidence for the alibi is not entitled to the slightest weight and when we have another Judge coming to the same conclusion, it does seem to me that there is ample ground for inquiry, or to put it in another way that a *prima facie* case has been made out against Kidha Singh. I do not wish it to be understood that I think a case has been made out which must necessarily lead to conviction. Far from that. But a cloud of suspicion has been raised and it will be in the interest of justice if it were dispersed and the truth arrived at as far as possible. For these reasons, I am unable to allow this appeal and I dismiss it.

V.B./R.K.

Appeal dismissed.

(1) [1909] 37 Cal. 1=34 I. C. 6.

(2) [1909] 37 Cal. 250=4 I. C. 6.

A. I. R. 1915 Allahabad 347

RICHARDS, C. J., AND PIGGOTT, J.

Kauleshar Prasad Misra—Defendant
—Appellant.

v.

Abadi Bibi—Plaintiff—Respondent.

Second Appeal No. 829 of 1911, Decided on 30th June 1915, from decree of Dist Judge, Ghazipur.

(a) Transfer of Property Act (4 of 1882), S. 54—Payment of consideration contingent on delivery of possession—Deed was sale deed within S. 54.

In a sale-deed there was a stipulation that the price should be paid within one year provided that possession was obtained within that time, that if possession was not so obtained, then the payment or the price should be postponed, and further that in the event of the vendee not getting the property the price should not be paid at all.

Held: that the deed was a sale-deed within the meaning of S. 54, T. P. Act. [P 347 C 2]

(b) Contract Act (9 of 1872), S. 23—Agreement of payment of consideration contingent on certain event is not opposed to public policy.

There is nothing contrary to public policy in providing that the payment of the consideration should be postponed in certain events and that it should not be paid at all in the event of the property being lost. [P 347 C 2]

M. L. Agarwala, Gulzari Lal and Haribans Sahai—for Appellant.*Abdul Raouf, Taj Bahadur Sapru and S. M. Sulaiman*—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiff for possession of a bungalow and compound. The plaintiff's title is as follows: The property they say belonged to one Ali Ahmad, who died in March 1910, leaving certain heirs who are the defendants of the fourth party. They made a deed in her (plaintiff's) favour on 4th July 1913. The defendants' title on the other hand is as follows: Ali Ahmad, they allege, executed a sale-deed in the year 1889, in favour of Mt. Idan. Mt. Idan died in 1912, leaving as her heir the defendant of the third party, Ramzan, and Ramzan by a sale deed, dated 30th June 1913, sold the property to the appellant, Psndit Kauleshar Prasad Misra. Both the Courts below have decreed the plaintiff's claim. Both Courts have found that the sale deed of 1889 was a fictitious sale deed under which no possession passed or was intended to pass; that Mt. Idan was the mistress of Ali Ahmad; that Ali Ahmad continued to be the owner and in possession of the property notwithstanding the sale deed.

This it seems to us is a finding of fact which we in second appeal are bound to accept.

The appellant however contends that there is a flaw in the plaintiff's title. In the sale deed of 4th July 1913, there is a stipulation that the price should be paid within one year provided that possession is obtained within that time, that if possession was not obtained, then the payment of the price should be postponed, and further that in the event of the vendee not getting the property, the price should not be paid at all. It is contended that the consideration for this contract is opposed to public policy, being a gambling transaction. It is further contended that there being a condition attached to the payment of the consideration, the transaction is not a sale within the definition of that expression contained in S. 54, T. P. Act. In our opinion there is nothing contrary to public policy in providing that the payment of the consideration should be postponed in certain events and that it should not be paid at all in the event of the property being lost. It certainly was not a gambling transaction. S. 54 defines a "sale" as

"a transfer of ownership in exchange for a price paid or promised, or part paid and part promised."

In our judgment the stipulations in the present deed did not prevent the transaction amounting to a "sale" within the definition

It is next contended that Ramzan, the appellant's vendor, was the ostensible owner of the property in suit with the consent, express or implied, of the real owners, and that the appellant took all reasonable care to ascertain that Ramzan had power to make the transfer in his favour. The Courts below have found that Ramzan was not the ostensible owner with the consent, express or implied, of the real owners, and they have further found that under the circumstances of the present case the appellant did not take reasonable care to ascertain the title of his vendor. In our opinion these are questions of fact upon which we must accept in second appeal the findings of the Courts below.

The result is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

***A. I. R. 1915 Allahabad 348**

RICHARDS, C. J. AND TUDBALL, J.
Ram Nath—Defendant—Appellant.
 v.

Narain and another — Plaintiff — Defendants—Respondents.

Second Appeal No. 459 of 1913, Decided on 19th May 1915, from decree of Dist. Judge, Jhansi, D/- 29th January 1913.

(a) **Bundelkand Land Alienation Act (2 of 1903), Ss. 3 and 14—Pre-emptor recorded as usufructuary mortgagee when sale not sanctioned—Transferors from mortgagors can redeem.**

Certain property situate in Bundelkhand was sold. The defendant brought a pre-emption suit and obtained a decree, but the sale was not sanctioned by the Collector as required by Act 2 of 1903 and the name of the pre-emptor was recorded as a usufructuary mortgagee for 20 years under S. 14 of the Act. The mortgagors then sold the property to the plaintiff who sued to redeem it from the defendant who was in possession as a mortgagee.

Held that the plaintiff was entitled to redeem the property. [P 348 C 2]

(b) **Bundelkhand Land Alienation Act (2 of 1903), S. 3—S. 3 applies to all permanent alienations.**

Section 3, Bundelkhand Land Alienation Act, applies to all "permanent alienations" even though the alienation is brought about by the exercise of a right of pre-emption. [P 348 C 2]

(c) **Bundelkhand Land Alienation Act (2 of 1903)—Policy of is to prevent non-agriculturalists acquiring property**

The policy of the Bundelkhand Land Alienation Act is to prevent persons, who are not members of an agricultural tribe, acquiring property. [P 348 C 2]

Harbans Sahai—for Appellant.

Tej Bahadur Sapru—for Respondents.

Judgment.—This appeal arises out of a suit to redeem a mortgage, dated 18th February 1892. Ram Nath, the appellant, is one of the original mortgagees. He contends that the plaintiff has no right to maintain the suit. It appears that after the date of the mortgage the mortgagors sold their equity of redemption to one Jagan Nath Ahir. Ram Nath Kayastha (to whom we shall hereafter refer as "the pre-emptor") brought a suit for pre-emption against Jagan Nath Ahir and obtained a decree which became final. When Ram Nath, the pre-emptor, applied to have his name recorded the Collector under the provisions of Act 2 of 1903 made an order in November 1910 refusing to sanction the permanent alienation in favour of the pre-emptor. By a later order he pointed out that all that he could do for the pre-emptor was to make him a usufructuary mortgagee for

20 years under the provisions of S. 14 of the Act. But seeing that there was already a usufructuary mortgagee in possession, he pointed out that the only way in which the pre-emptor could get possession would be by redeeming the mortgage of 18th February 1892. On 29th January 1912 the representatives of the original mortgagors sold the property to the plaintiff. The plaintiff then instituted the present suit, which was met by the defence, that the vendors of the plaintiff had no interest left of which they could make a transfer. It seems to us that this contention is not sound. The result of the pre-emption suit was that Jagan Nath Ahir ceased to have any interest in the property. The pre-emptor was substituted for him and the latter under the Collector's order was only a mortgagee. The consequence was that the ultimate right of redemption remained in the representatives of the original mortgagor. This right they were entitled to transfer to the plaintiff.

It is contended that having regard to the terms of the Collector's order the only person who could redeem the mortgage was Ram Nath, the pre-emptor. No doubt Ram Nath was given a right of redemption, but that did not and could not take away the ultimate right of redemption which must have been left as we think in the representatives of the original mortgagors. The mortgage of the appellant is a mortgage which can be redeemed at any time. It is quite unnecessary for us in the present case to decide whether or not Ram Nath, the pre-emptor, could have insisted upon remaining in possession for the whole of the 20 years even if the representatives of the mortgagors were ready to redeem it, nor is it necessary for us to express any opinion as to the effect of the consent which appears to have been given in open Court by the pre-emptor to the redemption of the property by the plaintiffs.

It is lastly contended that S. 3 does not apply to alienations by pre-emption. We think that the section applies to all "permanent alienations" even though the alienation is brought about by the exercise of a right of pre-emption. The policy of the Act is to prevent persons who were not members of an agricultural tribe acquiring property. This would apply just as much to a person who will

acquiring a permanent title by pre-emption as by voluntary alienations. We dismiss the appeal with costs including in this Court fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1915 Allahabad 349 (1)

BANERJEE, J.

Kiswar Ali Khan and another—Decree-holders—Appellants.

v.

Mt. Salimunnissa—Judgment-debtor—Respondent.

Execution Second Appeal No. 70 of 1915, Decided on 1st November 1915, from decision of Dist. Judge, Shahjahanpur, D/- 21st November 1914.

Bengal, Agra and Assam Civil Courts Act (12 of 1887), S. 21—Appeal on execution proceedings of suit above Rs. 5,000 though decreed less lies to High Court.

Where an original suit out of which an execution proceeding had arisen was valued at over Rs. 5,000, but was decreed for less than that amount, an appeal from an order in the execution proceedings would nevertheless lie to the High Court. [P 349 C 1]

S. M. Suleman—for Appellants.

Tej Bahadur Sapru—for Respondent.

Judgment.—The objection raised in this appeal is that no appeal lay to the Court below and that that Court had no jurisdiction to entertain the appeal presented to it. It appears that the original suit was valued at a sum exceeding Rs. 5,000. The claim was decreed in part and the decree provided that mesne profits should be determined in execution of the decree. An application was made to the Court of first instance for execution of the decree and for determination of the amount of mesne profits. The amount awarded by the Court of first instance was a sum of Rs. 448-4-6. The judgment debtor appealed to the District Judge and that Court reduced the amount awarded by the Court of first instance. It is clear, in view of the provisions of S. 21, Act 12 of 1887, that no appeal lay to the District Judge. The value of the original suit exceeded Rs. 5,000, and the proceeding in which the order complained of was made, was a proceeding arising out of that suit. Therefore as the value of the suit exceeded Rs. 5,000, the appeal lay to the High Court. I accordingly allow the appeal, set aside the decree of the Court below and direct that the memorandum of appeal be returned to the respondent for presentation to the proper Court. As the objection now

raised was not put forward in the Court below, I make no order as to the costs of this appeal. I direct that the record be not returned to the Court below for three weeks so that the memorandum of appeal may be promptly taken back and an appeal presented to this Court, if so advised.

V.B./R.K.

Appeal allowed

A. I. R. 1915 Allahabad 349 (2)

RICHARDS, C. J. AND PIGGOTT, J.

Ram Nath Tewari—Decree-holder—Appellant.

v.

Chatterpalman Tewari—Judgment-debtor—Respondent.

Letters Patent Appeal No 37 of 1915, Decided on 2nd July 1915, from decision of Chamier, J., reported in *A. I. R. 1915 All. 122*

Limitation Act (9 of 1908), S. 6—S. 6 applies to limitation provided by the Act—it does not apply to Civil P. C. (5 of 1908), S. 48.

As S. 6, Lim. Act, applies only to cases dealt with by the statute itself; it does not exempt a minor from the provisions of S. 48, Civil P. C. [P 350 C 1]

Sarat Chandra Chaudhuri and Iswar Saran—for Appellant.

Girdhari Lal Agarwala—for Respondent.

Judgment.—This is an execution appeal. It appears that a decree was obtained by minors on 22nd May 1901. There were several applications for execution leading up to one on 6th February 1912 which was dismissed on 3rd December 1912. The present application for execution was made on 27th May 1913. It thus appears that the last application for execution was more than twelve years from the date of the decree. The judgment-debtors resisted execution relying on S. 48, Civil P. C. This section provides that

“where an application to execute a decree, not being a decree granting an injunction, has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years”

from the various dates specified in the section. It is admitted that had the decree-holders been persons of full age, the present application would be clearly barred. It is however contended that being minors they are still entitled to execute the decree. The first Court allowed the objection of the judgment-

debtors. The lower appellate Court reversed the Court of first instance. The learned Judge of this Court reversed the lower appellate Court and restored the order of the Court of first instance.

Section 6, Lim. Act 9 of 1908, provides as follows :

"Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in Col. 3, Sch. 1."

It is admitted that the provision of this section does not help the present decree-holders. It might have given them a right to execute their decree notwithstanding the expiration of the three years' limit laid down in Art. 182, Sch. 1 but it does not give them any exemption from the provisions of S. 48, Civil P. C. In the case of *Moro Sadashiv v. Visaji Raghu Nath* (1), Sergeant, C. J., held, in a case similar to the present that, S. 7, of the former Limitation Act (which corresponds to S. 6, of the present Limitation Act) only applied to cases dealt with by the statute itself. He however goes on to say :

"The question referred to us must be decided by the general principles of law as to the disability of minors, to which the provisions of the Civil Procedure Code must, in the absence of anything to the contrary, be deemed to be subject. The general principle is that time does not run against a minor ; and the circumstance that he has been represented by a guardian, does not affect the question."

If we were to accept this statement of the law it would mean that a minor party to a suit through his guardian, whether as plaintiff or as defendant, is not bound to take any of the steps provided by the Code of Civil Procedure within the periods therein limited. For example it would be open to a minor judgment-debtor to reopen by way of appeal a question which had been finally decided years before. Just in the same way if a suit had been decided against a minor he might delay presenting his appeal for many years. The learned Judge of this Court has referred to the judgment of Sir Meredith Plowden in *Jhandu v. Mohan Lal* (2), and also to the decision of *Rebala Ramana Reddi v. Rebala Babu Reddi* (3) In our opinion the

judgment of the learned Judge of this Court was correct and ought to be affirmed. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 350

RICHARDS, C. J., AND PIGGOTT, J.

Kishan Lal—Plaintiff—Appellant.

v.

Sultan Singh—Defendant—Respondent.

Second Appeal No 971 of 1914, Decided on 2nd July 1915, from decree of Additional Judge, Fatehgarh.

Civil P. C. (5 of 1908), O. 11, R. 21—Non-production of book or documents would raise adverse inference but would not entail dismissal of suit unless order for discovery and inspection is disobeyed.

Where there is a strong ground for suspecting that a plaintiff is keeping back books and documents which he ought to have produced the Court is entitled to draw adverse inferences against the plaintiff but it cannot dismiss his suit under O. 11, R. 21, unless an order for "discovery" or "inspection" has been made and disobeyed by him. [P 351 C 1]

Surendra Nath Sen—for Appellant.

Judgment.—This appeal arises out of a suit brought to recover money alleged to be due on foot of four different mortgages. In the Court of first instance the learned Munsif was strongly of opinion that the plaintiff had in his possession or power certain documents which would throw light on the matter in dispute. With the consent of the plaintiff a visit was paid to the latter's house, a number of books were found but most of them likely to have a bearing on the case were not there.

After examining the plaintiff the Court dismissed the suit purporting to do so under the provisions of O. 21, R. 21. The lower appellate Court confirmed the decree of the Court of first instance. On the real merits of the case we do not feel much sympathy with the plaintiff. There is strong ground for suspecting that he was keeping back books and documents which he ought to have produced. The question however which we have to decide is whether the Court was entitled under the circumstances to dismiss the suit in the way it did. O. 11, R. 21, is as follows:

"Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents he shall if a plaintiff, be liable to have his suit dismissed for want of prosecution."

(1) [1892] 16 Bom. 536.

(2) [1894] 128 P. R. 1894.

(3) [1913] 37 Mad. 186=18 I. C. 596.

The rule concludes:

"and the party interrogating or seeking discovery, or inspection may apply to the Court for an order to that effect and an order may be made accordingly."

If we look back to the earlier rules of the same order it is quite clear that the learned Munsif and the lower appellate Court misapplied the rule. If a party wishes to get what is called "discovery of documents" from the other side, he makes an application under R. 12 asking the Court to order the other side to make discovery on oath of the documents which are or which have been in his possession or power relating to the matters in question. If the Court thinks fit it makes an order for discovery. The party upon whom this order of discovery is made is bound to comply with the order. The penalty for not complying with the order is that which is specified in O. 11, R. 21. Just in the same way after a party has admitted the possession of a document, the Court can make an order for inspection and if the Court's order is disobeyed the party complaining of the disobedience can apply for the enforcement of the order according to the provisions of O. 11, R. 21. In the present case there was no order for "discovery" or "inspection." We may point out to the Court below that if it was of opinion that the party was keeping back documents the Court is entitled to draw adverse inferences against the party withholding or keeping back documents. In our opinion the Court was not entitled to dismiss the suit under the provisions of O. 11, R. 21. We accordingly allow the appeal, set aside the decrees of both the Courts below, and remand the case to the Court of first instance through the lower appellate Court with directions to restore the case under its original number in the file and to proceed to hear and to determine the same according to law. As we think that the appeals were entirely due to the conduct of the plaintiff we make no order as to costs.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 351

RICHARDS, C. J.

Ram Nath Tewari—Judgment-debtor—Appellant.

v.

Mt. Genda—Decree-holder—Respondent.

Execution Second Appeal No. 732 of 1915, Decided on 4th November 1915, from decision of Dist. Judge, Benares, D/- 8th February 1915.

Decree—Construction—Conditional decree—Costs assessed on assumption of plaintiff performing conditions—Conditions not performed—Decree for costs not executable

A decree was passed in the following terms. "It will be established and declared that the sale-deed executed by defendants 2 and 3 in favour of defendant 1, is not binding upon the plaintiff; possession will be delivered to the plaintiff by dispossession of defendant 1 on condition of paying into Court Rs 66 within one month; in case of default, the plaintiff's suit will stand dismissed." A schedule of costs was given on the assumption that the money would be paid in time. The money was not paid within time.

Held, that under the decree as it stood, the defendant was not entitled to execution for costs. [P 352 C 1]

Damodar Das—for Appellant.

B. E. O'Connor—for Respondent.

Judgment.—This appeal arises under the following circumstances. The judgment-debtor brought a suit claiming a declaration that a sale-deed made by his mother and a brother's widow was not binding upon him, on the ground that it was an alienation made by Hindu widows without legal necessity. The Court held that there was legal necessity to the extent of Rs. 66 and it accordingly decreed the plaintiff's suit, but subject to the condition that he should within one month pay into Court the sum of Rs. 66. The plaintiff failed to pay the money into Court within the month. He did however pay it on a subsequent date and the Court accepted the money. Thereupon, the defendant *Mt. Genda* made an application for execution of the decree, contending that inasmuch as the plaintiff had failed to comply with the condition, the plaintiff's suit stood dismissed with costs. The application was to recover the costs that would be payable to the defendant in the ordinary course upon the plaintiff's suit being dismissed "with costs." The plaintiff raised objections. These objections have been disallowed by both the Courts below. The plaintiff has appealed. The

decree was drawn up in the following form :

"It will be established and declared that the sale-deed executed by defendants 2 and 3 in favour of defendant 1, is not binding upon the plaintiff; possession will be delivered to the plaintiff by dispossession of defendant 1 on condition of paying into Court Rs. 66 within one month; in case of default the plaintiff's suit will stand dismissed."

A schedule of costs follows. The schedule shows what the costs of each side would be if the condition had been duly fulfilled. In other words, the schedule is based on the assumption that the money would be paid in within the time specified. It will thus be seen that there was no award of costs to the defendant in the event of the condition not being fulfilled. The decree simply says the suit shall "stand dismissed." It is somewhat unfortunate from the plaintiff's point of view that he should lose the benefit of the decree in his favour simply by reason of his failure to pay the money into Court within the time specified. The defendant however is entitled by law to the benefit caused by the default of the plaintiff. On the other hand, the Court executing a decree can only execute the decree as it stands. If the decree was not in conformity with the judgment, it was the duty of the person interested in the decree to have it brought into conformity. In my opinion, the decision of the Court below was not correct and ought to be reversed. I hold that the defendant is not entitled to execution for costs. The other point in the case is connected with the effect of the omission of the plaintiff to pay the Rs. 66 into Court within the time specified. I think this is not an objection which, properly speaking, arose on the defendant's application to execute the decree for costs. If the plaintiff contends that he has still a decree in his favour notwithstanding that he did not pay the money in within the time, he should make an application for the execution of the decree and then the Court will decide the point. If again, the plaintiff considers that he is still entitled to get an extension of time for payment of the money into Court and that the Court has power to grant him such extension, he should make an application for such extension of time and the question can be decided. I wish to say that I am not deciding either of these two last men-

tioned questions. I allow the appeal, set aside the decree of both the Courts below and remand the case to the Court of first instance through the lower appellate Court with directions to dispose of the same, having regard to what I have said above. I make no order as to the costs of the appeal.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 352

CHAMIER, J.

Muhammad Asghar Khan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 525 of 1915, Decided on 28th July 1915, from order of Magistrate, Azamgarh.

Criminal P. C. (5 of 1898), S. 110 (f)—Evidence of general nuisance does not justify proceedings under S. 110.

Where the evidence produced against a person amounts to no more than this that he is a nuisance to his neighbours, refuses to pay his debts, abuses people who sell goods to him and makes indecent overtures to school boys who pass by his shop, it does not justify proceedings against him under S. 110, Criminal P. C.

[P 353 C 1]

Nehal Chand—for Applicant.

Malcolmson—for the Crown.

Judgment.—This is an application for revision of an order of the District Magistrate of Azamgarh dismissing the applicant's appeal against an order of a Magistrate of the First Class, requiring the applicant to give security for his good behaviour for one year. The evidence against the applicant is of a most unusual character. There is first the evidence of several boys who say that the applicant made indecent overtures to them when they passed his shop on their way to school. Then there is the evidence of some witnesses who say in a general way that the applicant is a bad character. The third class of evidence against the applicant consists of the statements of trades people and others living near him who have had trouble with him for one reason or another. The oil-seller, for instance, says that the applicant bought from him a bottle of oil worth one and half anna and afterwards refused to pay for it and abused the seller. A butcher says that the applicant is of a cantankerous nature and insists upon having another piece of meat instead of the piece which is offered to him. The darzi says that he has worked

for the applicant, but got only abused when he asked for his wages. The milk-seller says that the applicant took some milk from him without payment. A neighbour says that he bought some shoes from the applicant on approval and when he returned the shoes the applicant abused him.

The evidence of the third class, i. e., of the shop-keepers and neighbours appears to me to be totally irrelevant. The applicant has been required to give security under S. 110, Criminal P. C., Cl. (f), i. e., he is said to be so desperate and dangerous as to render his being at large without security hazardous to the community. The third class of evidence mentioned by me at best shows no more than that the applicant is a very troublesome person and a man who declines to pay his debts and abuses people who sell goods to him. Such evidence does not bring the applicant within Cl. (f), S. 110, Criminal P. C. The general evidence of bad character may be disregarded. It amounts to no more than that the applicant is a nuisance to his neighbours. I have no doubt that the real reason why proceedings were taken against this man is that several boys complain that he had made indecent overtures to them. Their complaint was made to the schoolmaster who passed it on to the tahsildar and the police. In my opinion if the evidence is proved it does not justify proceedings against the applicant under S. 110, Criminal P. C. I allow this application and set aside the order requiring the applicant to give security.

V.B./R.K.

Order set aside.

A, I. R. 1915 Allahabad 353

RICHARDS, C. J. AND RAFIQUE, J.

Bharat Indu and others—Plaintiffs—Appellants.

v.

Muhammad Mahbub Ali Khan and another—Defendants—Respondents.

First Appeal No. 33 of 1913, Decided on 11th November 1915, from decision of Sub-Judge, Bareilly, D/- 16th September 1912.

Benami—Test of benami is source of consideration.

Where a property is alleged to have been purchased by one man in the name of another the question of ownership must depend upon the answer to the question with whose money was the property purchased: 3 *M. I. A.* 229 (*P.C.*) and *A. I. R.* 1915 *P. C.* 96, *Ref.* [P 354 C 1]

Sunder Lal—for Appellants.

B. F. O'Connor—for Respondents.

Richards, C. J.—The suit out of which this appeal arises was the outcome of another suit which was brought as far back as the year 1896. This last-mentioned suit was a suit to realise the amount of a mortgage by sale of mortgaged property including the property now in dispute. On 26th March 1896 a decree was passed in favour of one Rai Bahadur Babu Durga Prasad for the sum of Rs. 85,665. The present plaintiffs are the sons of the said Babu Durga Prasad. In execution of the above-mentioned decree the property (the subject matter of the present suit) was put up for sale and purchased in the names of Mt. Bigga Begam and a man named Ahsan Ali. The sale took place on 20th July 1898, and the sale certificate is dated 12th August 1899. On 20th December 1899 Ahsan Ali executed a deed in which he admitted that the entire purchase-money of the property mentioned in the plaint in the present suit, as also the purchase-money of an indigo factory which was sold at the same time, was altogether provided by the Mussamat and that he "had not and never had" any interest in the property sold. Mt. Bigga Begam was the wife of one Hakim Muhammad Wilayat Ali Khan, the person against whom the mortgage-decree was passed. The said Ahsan Ali was a nephew of the said Wilayat Ali Khan. It may be noted here that in the deed to which I have just referred, Ahsan Ali Khan does not purport to relinquish any rights. The statement in the deed is that he "has not and never had any right or interest." The purchase-money of this property now in dispute was Rs. 10,075. The price of the indigo factory was Rs. 1,810. The mortgaged property having proved insufficient to satisfy the mortgage-decree a further decree was obtained under S. 90, T. P. Act on 1st December 1906. The result of this last-mentioned decree was that the decree-holder was entitled to realize the balance still remaining due on foot of the decree from any other property which belonged to the judgment-debtor. Various applications were made for execution, with the result that a large additional sum was realized. Finally after the death of Mt. Bigga Begam the decree holders attempted to attach

the property now in dispute. In the first place they alleged that the property had been inherited by Wilayat Ali Khan, from his widow Bigga Begam. The application to sell this property was refused. The result was the institution of the present suit. The plaintiffs' claim now is that the property was all along the property of Wilayat Ali Khan; in the alternative they contend that even if the property belonged to the Musammat it was inherited by Wilayat Ali Khan and is therefore, liable to satisfy the balance of the decree still remaining due. The defence is that the property was purchased by the Musammat with her own money and that prior to her death she disposed of the same by will that her heirs accepted the will and that Wilayat Ali Khan never had any interest in the property from the date of its sale in 1898. I may here point out that even if the purchase in 1898 was really a purchase by Wilayat Ali Khan in the names of his wife and nephew, it ceased to be liable to the mortgage. The property can now only be sold by virtue of the personal decree under S. 90.

The question for decision is whether the property belonged to Wilayat Ali Khan or his wife Bigga Begam. This question, it seems to me, must depend upon the answer to another question, namely with whose money was the property purchased: see *Dhurm Das Pandey v. Shama Soondri Debiak* (1) and the recent case of *Balas Kunwar v. Desraj Ranjit Singh* (2). I may mention here that while there was nothing to prevent Wilayat Ali Khan making his wife a present of the property there is no evidence that he did so and this is not the case for the defendants. Their case is that the money belonged to the lady. On 18th July 1898 Hakim Muhammad Wilayat Ali Khan mortgaged certain property to secure the sum of Rs. 6,000 the mortgage being in favour of Gobardhan Das. According to the registration endorsement Rs. 5,000 was paid in cash and a rukka for Rs. 800 was returned. The consideration appears to have been Rs. 5,045 and the

discharge of the rukka for Rs. 800 principal and Rs. 155 interest. On 19th July 1898 Hakim Muhammad Wilayat made another mortgage to secure Rupees 6,000. This was made in favour of Gauri Sahai, father of the mortgagee in the other mortgage. The plaintiffs contend that the raising of this sum of Rs. 11,000 odd in cash two days before the property in dispute was put up for sale is very significant and strong evidence that Wilayat Ali Khan was raising the money to buy in the property that was being sold on foot of the mortgage decree. It seems to me that there is great force in this contention, unless the defendants can satisfactorily show that the money was raised for some other purpose. No books or documentary evidence are produced to show to what purpose this Rs. 11,000 odd was applied. But a witness of the name of Jaffer Khan is produced, who says that he used to have dealings with Wilayat Ali Khan who borrowed from him on one occasion Rs. 4,900 under a note of hand, that "God knows what difficulty he had to encounter in making Wilayat Ali Khan pay up the Rs. 4,900," that Wilayat Ali Khan about 14 years ago borrowed money from Gauri Sahai and his sons and paid him.

In cross-examination he had to admit that the money which he advanced to Wilayat Ali Khan was not entered in his accounts. He admits that there are other entries relating to his business transactions with Wilayat Ali Khan in his account books. He says that this sum was not entered because the amount had been advanced from his house and not from his shop. I absolutely disbelieve this witness. It seems to me most improbable that Wilayat Ali Khan when he must have wanted money and when his property was being sold, would have paid off the debt of Jaffer Khan even if such debt existed. Jaffer Khan had not even a decree against him. I think however one has only to read the evidence of Jaffer Khan to come to the conclusion that there was no debt at all. In my opinion the purpose to which the money borrowed in 1898 by Wilayat Ali Khan was applied would appear from entries in his account books if they were produced.

The next point to consider is the probability of Bigga Begam being possessed

(1) [1841-46] 3 M. I. A. 229-6 W. R. 43=1 Suth. 47=1 Sar. 271=18 E. R. 484. (P.C.).
 (2) A. I. R. 1915 P. O. 96=37 All. 557=42 I. A. 202=30 I. C. 299 (P.C.).

of money to make the purchase. Ahsan Ali whose name was joined with herself in the purchase says that the whole amount belonged to the lady, that she gave him Rs. 14,000 one day before the auction sale, that he went there to make the purchase on behalf of Bigga Begam. He states that before the purchase she and he were partners in a sugar factory and that the purchase was made in pursuance of an agreement between Bigga Begam and him that they should purchase the village share and share alike and that he would pay his share of the price in two or four years out of the income accruing from the sugar factory. In cross examination he had to admit that he had no accounts of the profits and loss of the sugar factory. He made some vague statements that the Musammat had considerable means. He said that the father-in-law of Bigga Begam (that is, the father of Wilayat Ali Khan) used to allow her Rs. 200 or Rs. 250 per mensem and that after his death Wilayat Ali Khan made her a similar allowance. He admitted that the father of the lady had no zamindari, nor had the lady. He admitted that Wilayat Husain was the own brother of Bigga Begam and that the profit of his business (whatever it was) was not even assessable with income-tax. His sons were cultivators and plied three or four ekkas on hire. It seems to me from a perusal of this witness' evidence that the father of Bigga Begam was a man of no property and that he was unable to give money to his son and still less to his daughter Bigga Begam. Furthermore, I think that if the lady really had property and was in a position to produce Rs. 14,000 in a lump sum the day before the auction sale, accounts would be forthcoming. The case for the plaintiffs may be summed up as follows :

(1) The sale was admittedly fictitious to this extent that Ahsan Ali was joined in the purchase and he admitted by a deed that he never had any interest whatever therein.

(2) That the borrowing of the Rupees 12,000 two days before the sale unexplained proves that the money was the money of Wilayat Ali Khan.

(3) That not only is it not shown that the money belonged to the Musammat, but the evidence shows that she was a woman of no private means.

The defendants, on the other hand, contend that the onus of showing that the money belonged to Wilayat Ali Khan lay on the plaintiffs and that they have not discharged the onus. It appears that after the death of the Mussamt Wilayat Ali Khan and the other heirs accepted in writing an alleged will made by the Mussamt in favour of Hakim Mahbub Ali, Khan Mr. O'Connor on behalf of the respondents strongly relied on this fact. He contends that Wilayat Ali Khan by accepting the will admitted that the property belonged to his wife. I think the force of this argument entirely depends on the state of Wilayat Ali Khan's financial position at the time he made the so-called admission. If he was in financial difficulties, it might be much more to his interest to allow the property to come to his nephew than to claim it for himself. Furthermore, it appears that these admissions were made after the decree-holders had made a move to make this very property available for the satisfaction of the balance due on foot of the decree. An injunction had issued at the instance of the decree-holders restraining Wilayat Ali from dealing with the property.

Mr. O'Connor further relied on the fact that the decree-holders had never challenged the title of Mt. Bigga Begam between the years 1898 and 1908. He contends that this fact shows that the decree-holders themselves considered that the property really was the property of the Musammat, otherwise they would have attached it long ago. I am not much impressed with this argument. Up to the year 1905 when the decree under S. 90 was obtained, only the mortgaged property could be made available for the satisfaction of the mortgage decree and it was of no consequence whether the property belonged to the husband or wife.

It was only when the mortgage security was exhausted that the decree under S. 90 was or could be obtained. It is an admitted fact that after the decree under S. 90 was obtained in the year 1906, the decree-holders succeeded in realizing a very large sum out of property admittedly belonging to Wilayat Ali Khan other than the mortgaged property. It is therefore not surprising that no move was made against this property until the year 1908 or 1909. The learned Sub-

Judge decided in favour of the defendants.

He says in his judgment:

"It was argued on behalf of the plaintiffs that Bigga Begam was not rich enough to pay for the property. But from the evidence of Muhammad Ahsan, Hamid Ali Khan and Ashraf Ali Khan, witnesses examined by the defendants, it appears that she was a rich lady. These witnesses have stated that she was in receipt of a sum of Rs. 200 a month from her father-in-law from the date of her marriage and from her husband from the date of his father's death. Muhammad Ahsan witness has stated that Bigga Begam and he were partners in a khandsal concern. The witnesses Gobardhan Das and Ramji Mal could not state if Bigga Begam had any money of her own. They did not know her father and brothers. Ramji Mal no doubt adds that he infers that her father must have been an ordinary man from the fact that her nephews ply ekkas now-a-days. But there is nothing extraordinary about a rich man's heirs to be placed in that position, but to judge of their predecessor from their present state of wealth is a far fetched conclusion. Such being the evidence of the plaintiffs' witnesses, the testimony of the defendant's witnesses on this point must be believed."

It seems to me that the learned Judge has not fully appreciated the force of the evidence. He disbelieves perhaps with some reason the evidence of Gobardhan Das and Ramji Mal that when Wilayat Ali Khan was executing the two mortgages for Rs. 6,000 each, he openly stated that the money was being raised for the very purpose of purchasing the property. It is suggested that if a secret purpose was being made for the debtor, he would not speak about it. It must be remembered however that at that time Wilayat Ali Khan had still a large amount of property, the amount of the decree had not swelled to the extent it subsequently did by the accumulation of interest and it may well have been then hoped that the decree would be discharged. But even if we discard the oral evidence, the fact still remains that Wilayat Ali Khan raised Rs. 11,000 odd at the very time the property was being sold and that no satisfactory account is given as to how this money was applied. On the contrary the account that is given cannot be believed. The learned Judge says:

"from the evidence of Muhammad Ahsan, Hamid Ali Khan and Ashraf Ali Khan it appears that the Musimmat was a rich lady."

I have already dealt with the evidence of Muhammad Ahsan. It is true that all these three witnesses make a vague statement that the lady was rich and that her father was a rich man but it is not shown that they had any personal

knowledge of these matters, and it appears from the cross-examination of the witnesses that her father was not a rich man. There is not a particle of evidence that the lady got property from her father during his lifetime or at his death. The witnesses say that she got an allowance of Rs. 200 a month from her father-in-law and afterwards from her husband, but this allowance would not make the lady a "rich" lady and it is not shown how these witnesses came to know that she received an allowance of Rs. 200 a month. If the lady was a rich lady it is certain that she would have had account books. It seems to me that the learned Judge has overlooked the significance of the admitted fact that Rs. 11,000 odd was raised on the very eve of the sale and that he has come to the conclusion that she was a rich woman on evidence not worthy of the name. I am quite satisfied on the evidence that the money which purchased the property belonged to Wilayat Ali Khan and not to his wife. If this view be correct, it is quite unnecessary to consider whether Wilayat Ali Khan could assent to the will of his wife and so defeat his creditors. I think the Court below had a certain amount of sympathy, perhaps not unnatural, with the defendants on the ground that the decree-holders have realized a very large sum on foot of their decree. We are bound however to throw aside any feeling of this kind and to decide the case on the evidence before us. I would allow the appeal.

Rafique, J.—I concur.

By the Court.—The order of the Court is that the appeal prevails and is allowed. The decree of the lower Court is set aside and the claim of the plaintiffs-appellants is decreed, with costs of both the Courts including fees in this Court on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 356

CHAMIER, J.

Har Dayal and another—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 316 of 1915, Decided on 21st May 1915, from order of Asst. Sess. Judge, Cawnpore.

Criminal P. C. (5 of 1898), S. 408, (b)—One of several accused sentenced to more than four years and others to four years — Al-

though former does not appeal latter's appeal lies to High Court.

Where an Assistant Sessions Judge sentences one of the several accused in a case to rigorous imprisonment for more than four years and others to a term of four years each, an appeal lies to the High Court, although the accused sentenced to the higher term of imprisonment does not appeal. [P 357 C 1]

Lalit Mohan Banerji—for the Crown.

Judgment.—The appellants have been convicted by an Assistant Sessions Judge of an offence under S. 457, I. P. C., and have been sentenced to four years' rigorous imprisonment each. At the same trial Chhote alias Bhawani was convicted of the same offence and sentenced to six years' rigorous imprisonment. Chhote has not appealed. The two appellants in the first instance presented their appeals to the Court of the Sessions Judge of Cawnpore. The officer forwarded the appeals to this Court on the ground that under S. 408, proviso (b), Criminal P. C., none of the convicts could appeal to the Court of Session. The question has been raised in more than one case of this kind, whether an appeal against a sentence of imprisonment not exceeding four years lies to the High Court by reason of the fact that another person convicted at the same trial was sentenced to imprisonment for a term exceeding four years. Both Tudball, J., and Piggott, J., have held that in such a case as this all the appeals lie to the High Court. I am of the same opinion. This case is one which comes within the terms of proviso (b) to S. 408, Criminal P. C. The fact that the person upon whom a sentence of imprisonment exceeding four years has been inflicted has not chosen to appeal does not affect the question. On the merits I have no doubt that the appellants, Har Dayal and Muhammad Husain, were rightly convicted. I have examined the evidence and I entirely agree with the Assistant Sessions Judge and the assessors that the two appellants were among the men who broke into the complainant's house on the night in question. Their appeals are dismissed.

V.B./R.K.

Appeals dismissed.

A. I. R. 1915 Allahabad 357

CHAMIER, J.

Debi Singh and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 286 of 1915, Decided on 19th June 1915, from order of Sess. Judge, Etawah.

Criminal P. C. (5 of 1898), S. 423—Appellate powers are not intended to be used to spring up new case without notice.

The powers conferred by the Code of Criminal Procedure upon a Court of Appeal are not intended to be used in such a way as to spring up a new case on the accused without giving him any notice of the charge which he has to meet.

[P 358 C 1]

Wallach—for Applicants.

Assistant Govt. Advocate—for the Crown.

Judgment.—The four applicants and five others were convicted by a Magistrate of the first Class at Etawah on what is probably one of the most remarkable charges ever framed under Ss. 147 and 325, I. P. C. The charge runs:

"That you on or about 20th September 1914, at Bhasan (or elsewhere) fought against Kallu Singh or Hulas Singh (and perhaps others) with lathis and inflicted grievous hurt on the head of Kallu Singh."

It appears that the police had reported as the result of an inquiry held under S. 202, Criminal P. C., that there had been no riot at all but that there had been an affray with four men on each side. On the evidence recorded by him the Magistrate came to the conclusion that the facts were that when the complainant, Kallu Singh, was passing the door of one Mahindar Singh the latter challenged him; Kallu Singh maintained that he had a right to pass that way and was set upon and beaten to the ground; that Kallu's brother, Hulas Singh, who followed a short distance behind was also beaten. Both Kallu Singh and Hulas Singh said that all nine accused persons had joined in the attack. The nine men having been convicted by the Magistrate appealed to the Sessions Judge, who disbelieved the witnesses examined by the Magistrate and sent for and examined another batch of witnesses and on the strength of their evidence, came to the conclusion that what had really happened was that lathis had been snatched away from two men named Pobpa and Behari, that they

accompanied by Kallu Singh and Hulas Singh went to demand the return of the lathis from the accused, Debi Singh, and the two complainants were beaten by Dehi Singh, Gambhir Singh and two sweepers, Saktu and Kanhaiya. These four are the applicants before me. It is impossible to say that the case accepted by the Sessions Judge is not covered by the charge framed by the Magistrate. For that charge would cover any violent attack on the complainants made by any of the accused at any place whether in the village or out of it, but notwithstanding the charge the case for the prosecution must be taken to have been that presented by the witnesses examined by the Magistrate. Neither the story told by those witnesses nor the story told by the witnesses called by the Sessions Judge appears to be a probable one. It is not unlikely that both are false. In my opinion the powers conferred by the Code of Criminal Procedure upon a Court of Appeal are not intended to be used in the way in which they were used in the present case. A totally new case was sprung up on the accused by the Court of Appeal and the accused were given no proper notice of the charge which they had to meet. I set aside the convictions of the applicants and the sentences passed on them. If they are in custody, they must be released. If they are out on bail, the bail will be discharged.

V.B./R.K. *Convictions set aside.*

A. I. R. 1915 Allahabad 358

TUDBALL, J.

Bachicha Singh—Plaintiff—Appellant.

v.

Jafar Beg—Defendant Respondent.

Second Appeal No. 1206 of 1914, Decided on 17th June 1915 from decree of District Judge, Allahabad.

Civil P. C. (5 of 1908), S. 80—Suit against police officer for acts done under Criminal Procedure Code—Notice is essential—S. 42, Police Act, does not apply—Police Act (5 of 1861), S. 42.

Where a suit is brought against a police officer for acts done by him in the exercise of the powers granted to him by the Criminal Procedure Code, S. 42, Police Act does not apply. The plaintiff must give to such officer two months' notice as provided in S. 80, Civil P. C.

[P 359 C 1]

Pearey Lal Banerji—for Appellant.

Rama Kant Malaviya and Narsing Dass—for Respondent.

Judgment.—This is a plaintiff's appeal. The plaintiff brought a suit against the defendant, Jafar Beg, and others with whom we are not concerned in this appeal, to recover damages for malicious prosecution. His case was that a riot occurred and a report was made by certain complainants in the course of which they named one Bachcha Ahir. At the instigation of certain persons the defendant, who was the Sub-Inspector, put the name of Bachcha Singh in place of Bachcha Ahir, proceeded to make an inquiry against him, arrested him, and sent him for trial in Court where he was finally acquitted. The present suit was decreed as against one of the other defendants. As against Jafar Beg it was dismissed by the Court on first instance on the ground that under S. 42, Police Act, the suit had not been instituted within three months of the unlawful act alleged. The plaintiff appealed. The lower appellate Court upheld the decree of the Court of first instance but for a different reason. Notice was given by the plaintiff to the defendant on 7th June 1912; the suit was instituted on 18th July 1912. Applying S. 80, Civil P. C. the lower Court held that the suit must fail as it was brought before the expiry of two months next after notice had been delivered to the defendant as set forth in the section.

The plaintiff has come here in second appeal. This urged that under S. 42, Police Act, it was necessary for the plaintiff to give only one month's notice and not two months' notice as laid down in S. 80, Civil P. C. It seems to me that the fallacy in the argument lies in this, that S. 42, Police Act, refers to:

"all actions and prosecutions against any person which may be lawfully brought for anything done or intended to be done under the provisions of the Police Act itself or under the general police powers thereby given."

The present suit for damages is brought against the Sub-Inspector for acts done by him in the exercise of the powers granted to him by the Criminal Procedure Code. What he did was no thing done under the provisions of the Police Act or the general police powers given under the Act. I have been referred to Ss. 23 and 24, Police Act. S. 23 merely lays down that it is the duty of every police officer, among other things: "to apprehend, all persons whom he is legally authorized to apprehend, and for whose apprehension sufficient grounds exist."

This no doubt lays down what the Sub-Inspector's duty was but this does not give him any power to arrest. That power he receives under S. 24, Police Act. S. 24 simply says that

"it shall be lawful for any police officer to lay any information before a Magistrate and to apply for a summons, warrant, search warrant, or such other legal process as may by law issue against any person committing an offence."

In the present case the acts of which complaint is made were acts of arrest and prosecution in the Court of the Magistrate. Neither of these is an act which is contemplated by S. 24, Police Act. The special period of limitation which was given in S. 42, Police Act, has been repealed by the subsequent Limitation Act Act 9 of 1871, Sch. 1. That Act merely repealed so much as related to limitation of suits, but it did not alter the scope of S. 42 of the Act which clearly related to acts done under the provisions of that Act itself or the general police powers given by that Act. It cannot and does not relate to suits or actions brought in regard to acts done in the exercise of the powers granted by other Acts to police officers. In my opinion the decision of the lower Court is correct. S. 80, Civil P. C. applies and the suit was instituted before the expiry of two months mentioned therein. The appeal therefore fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 359

RICHARDS, C. J. AND BANERJEE, J.

Jawahir Mal and others—Defendants—Appellants.

v.

Udai Ram and others—Plaintiffs—Respondents.

First Appeal No. 109 of 1915, Decided on 15th November 1915, from order of Sub-Judge, Aligarh, D/- 3rd May 1915.

Transfer of Property Act (4 of 1882), S. 101—Usufructuary mortgagee purchasing property in execution of his simple mortgage decree—Mortgagee rights cease to exist.

Where a usufructuary mortgagee purchases the property in execution of his own decree on the basis of a simple mortgage, he becomes the absolute owner of the property and the mortgagee right ceases to exist by virtue of the law of merger. [P 359 C 2]

G. L. Agarwala—for Appellants.

P. L. Banerjee—for Respondents.

Judgment.—The question in this and the connected appeal is the same and

arises under the following circumstances: One Jugal Kishore was in possession under a usufructuary mortgage dated November 1868. He had also a simple mortgage on the same property. Jugal Kishore brought a suit on foot of the latter mortgage, obtained a decree and purchased the property himself. Later on the defendants, who held a decree against a judgment-creditor of Jugal Kishore attached the decree held by that judgment-creditor and in execution thereof applied for the attachment of the property of Jugal Kishore. It is admitted that under these circumstances the defendants were in the same position as if they themselves had a decree against Jugal Kishore. There can be no doubt that if they had attached "the interest of Jugal Kishore in the property" they would have a right to sell all the interest Jugal Kishore had. In other words they would have been entitled to attach and bring to sale the absolute ownership which had become vested in Jugal Kishore. Instead however of attaching his interest they attached merely what they described as the "mortgagee rights" of Jugal Kishore. It was "mortgagee" rights which were put up to sale and according to the sale certificate it was "mortgagee" rights that were purchased by the defendants. The present suit is a suit by the plaintiffs, who are heirs of Jugal Kishore, asking for possession of the property and in the alternative that they should be allowed to redeem the mortgage. The Court of first instance dismissed the case upon a preliminary point. The lower appellate Court overruling this preliminary ground remanded the case for decision on the merits. The defendants have appealed.

It is contended on their behalf that when Jugal Kishore, who was a mortgagee under a usufructuary mortgage, put up the property of his mortgagor to sale and purchased the property, a merger in law took place and Jugal Kishore became the absolute owner and the mortgagee right ceased to exist. This no doubt is quite correct, but it does not help the defendants who are themselves responsible for only having attached and purchased "mortgagee" rights. Under the circumstances we think that the view taken by the Court below on this point was correct and accordingly it

order of remand must be affirmed. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1915 Allahabad 360

CHAMIER, J.

On difference between

RICHARDS, C. J. AND BANERJEE, J.

Risal Singh and another—Appellants.
v.

Balwant Singh and others — Respondents.

First Appeal No. 144 of 1914, Decided on 29th March 1915, from decision of Sub-Judge, Saharanpur.

Civil P. C. (5 of 1908), S. 11—Adoption contested on ground of fact of adoption and absence of permission—First Court held adoption proved and dismissed widow's suit on ground of estoppel—Evidence of permission was not recorded—Privy Council held adoption and permission proved—Decision held binding on reversioner in absence of fraud or collusion—Hindu Law, Widow.

A Hindu widow sued her alleged adopted son for a declaration that she had not adopted him and even if she had adopted him, the adoption was invalid, as she had no authority from her husband. The Court of first instance dismissed the suit finding that the defendant had been adopted and the widow was estopped from questioning the validity of the adoption without trying other issues or recording oral evidence in regard to them. The High Court affirmed the decision. The Privy Council agreed with the High Court as to the factum of adoption but found on a consideration of the documentary evidence that the authority to adopt had been proved. After the widow's death a reversioner sued the defendant for possession on the same grounds as the widow had sued.

Held: (Per Banerji and Chamier, JJ) that the previous suit was a bar to the present suit inasmuch as a decree fairly and properly obtained against a widow in possession of her deceased husband's estate was, in the absence of fraud and collusion, binding on the reversionary heirs unless the decree relates to a matter personal to her. (Richards, C. J., dissenting)

[P 364 C 1; P 366 C 2]

Per Chamier, J.—A Court may refuse to summon witnesses or admit evidence, and, when its decision is subsequently relied upon as constituting a question res judicata, the Court trying the subsequent case cannot disregard the decision because it thinks that the Court trying the earlier case ought to have summoned the witnesses or admitted further evidence. [P 366 C 2]

Per Richards, C. J.—It is very dangerous to place too much reliance on expressions used in giving judgments in other cases where the facts and circumstances were different. [P 362 C 1]

W. Wallach and Peary Lal Banerji—
for Appellants.

Satish Chandra Banerji, Lalit Mohan Banerji, Surendra Nath Sen, Ramakant Malaviya and Yatis Chandra Ray—for Respondents.

Richards, C. J.—This appeal arises out of a suit in which the plaintiffs claimed property known as the Landhaura Estate. One Raghubir Singh was the last owner. He died leaving a widow, Rani Dharam Kunwar, who gave birth to a posthumous son named Jagat Prakash Singh. This boy died shortly after his birth and the Rani purported to adopt a number of boys, one after the other, all of whom died in infancy. Finally she is alleged to have adopted the defendant, Balwant Singh. The Rani died on 12th November 1912 and plaintiff 1 claims to be the reversioner and entitled to the estate on the death of the Rani. Plaintiff 2 is an assignee of a portion of the estate from plaintiff 1 and is probably the financier of the present litigation.

The allegation of the plaintiffs is that Raghubir Singh never gave authority to his widow to adopt a son. The Court below has dismissed the plaintiffs' suit holding that a previous litigation between Rani Dharam Kunwar and Balwant Singh operates as res judicata. The Court did not receive any evidence on the question whether or not plaintiff 1 is what he claims to be, namely the reversioner and heir to the property, nor on the question whether or not the Rani was authorized by her husband to adopt. The sole question which we have to decide in the present appeal is whether the previous litigation operates as res judicata.

It seems to me that we are bound to deal with the appeal on the assumption that the plaintiffs might possibly have been able to adduce evidence which would satisfy the Court, first, that plaintiff 1 is the reversioner and second, that Raghubir Singh never authorized his wife to adopt a son. If the Court below was correct in holding that the previous litigation operated as res judicata, it was quite unnecessary to go into the evidence on either of these two points. If, on the other hand, the previous litigation does not operate as res judicata, then clearly the Court ought to have heard the evidence and it is our duty to remand the case for that purpose.

There can be no doubt (whether the Rani had the authority to adopt or not) that a ceremony of adoption was in fact gone through in the most public manner possible. Prior to or simultaneously with the alleged adoption the Rani had

obtained an agreement from the father of Balwant Singh that notwithstanding the adoption she should be allowed to remain in possession of the estate during her life. Immediately after the alleged adoption disputes arose between the Rani and Balwant Singh; the latter wished to repudiate the agreement and go into possession of the estate, a course of action which was strongly resented by the Rani. The result was that she instituted a suit in the year 1905 alleging that she had no power to adopt Balwant Singh and that she had not adopted him. This was the commencement of the litigation which the Court below has found to operate as *res judicata*.

The Court of first instance (in that suit) declined to go into any evidence on the question of the Rani's authority to adopt holding that whether or not the Rani had authority, she was estopped by her conduct from denying her authority and dismissed the suit. The Rani appealed to the High Court. The High Court confirmed the decision of the Court below and dismissed the plaintiff's suit. It will thus be seen that the Courts in India decided the case on a ground entirely personal to the Rani and without having considered or even received the evidence on the question as to whether or not authority to adopt had been conferred on the Rani.

The law of *res judicata* is set forth in S. 11, Civil P. C. It provides that :

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The plaintiff in the present suit was, of course, no party to the previous litigation, nor does he "claim under" the Rani. He claims as reversioner or heir of the last male owner. No doubt the doctrine of *res judicata* has been extended by the Courts to cases in which it can fairly be said that the widow represents the estate. A common case of this kind is where a widow in possession or entitled to possession of her husband's estate brings a suit to recover possession of property which she claims to belong to that estate, against a third party. If that litigation is fairly and honestly conducted

the reversioner is not allowed to re-open the question after the widow's death. The principle established being, as it seems to me, that in the majority of cases the widow can and does represent the estate and that in all such cases the reversioners are bound. The principle is most reasonable and it is to be regretted that it is not expressly enacted in the Code so as to make the latter complete.

We have now to see whether in the previous litigation to which I have referred the Rani can be said to have represented the estate. It seems to me that—upto the time of the decree of the High Court dismissing the appeal, she most certainly did not represent the estate. The Courts did not allow her to "represent" the estate; they excluded evidence which she should have given if she was "representing" the estate. The case was decided both by the trial Court and the High Court on a ground personal to the Rani herself. These Courts had held that evidence as to authority to adopt having been conferred on her was immaterial and irrelevant inasmuch as, even if the Rani had no authority, she ought not to be allowed to say so as against the defendant, Balwant Singh. The issue of the authority of the widow to adopt was not "heard or finally decided." On the contrary, the Court, declined even to receive evidence on the issue. The Rani however was not satisfied with the decision of the High Court and appealed to His Majesty in Council. See *Rani Dharam v. Kunwar Balwant Singh* (1). Their Lordships affirmed the decree of the High Court and dismissed the appeal of the Rani. In the course of judgment their Lordships said :

"Their Lordships, in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh's action when she was pleading as to her authority. Their Lordships however do not differ from the Courts below in the view they have taken as to the applicability of the doctrine of estoppel in this case. Of course the estoppel pleaded against the Rani must be taken as purely personal. It does not bind any one who claims by an independent title, but, in view of the decision now given, that the respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question."

Notwithstanding that the Rani had by her conduct rendered it extremely diffi-

sult for her to fairly "represent" the estate in her litigation with the defendant, it may perhaps be conceded that the finding of their Lordships would have operated as *res judicata* had the evidence been admitted and recorded. It seems to me however quite clear that had their Lordships' attention been called to the fact that the trial Court had declined to receive evidence they would never have decided the case as a question of fact so as to bind the estate without at least directing evidence on the issue to be recorded and considered. The Rani was not a very truthful person, and in a previous suit by one Baldeo, claiming to be the reversioner and challenging (*inter alia*) the alleged authority to adopt, the Court found that Baldeo had failed to establish that he was the reversioner and that it was therefore unnecessary to decide the issue as to authority, but the learned Judge gave it as his opinion that it was highly improbable that any authority had been conferred. I mention this fact merely as suggesting that no finding on the statement of the Rani could be satisfactory without hearing all material evidence that could be produced.

It seems to me that the judgment of their Lordships can no more operate as *res judicata* than the judgment of the trial Court if it had decided an issue after excluding evidence relevant thereto. It is however contended that in the absence of fraud all decrees against a Hindu widow bind the reversioners and certain expressions of learned Judges of the Indian Courts and of their Lordships of the Privy Council are quoted in support of the contention. This contention is clearly not correct. Their Lordships themselves evidently felt that if the case was decided on a ground personal to the Rani the reversioner would not be bound. It seems to me that it is very dangerous to place too much reliance on expressions of learned Judges used in giving judgment in other cases where the facts and circumstances were different. The expressions relied on one and all occur in judgments in cases where the Hindu widow could be said to have fairly "represented" not only herself but also the estate. Jessel M. R., in *Hallett's Estate In re, Knatchbull v. Hallett* (2), speaking of the proper use of authorities, say:

(2) [1879] 13 Ch. D. 696=49 L. J. Ch. 415=42 L. T. 441=28 W. R. 732.

"The only use of authorities, or decided cases is the establishment of some principle which the Judge can follow out in deciding the case before him."

In *Quinn v. Leathem* (3), Halsbury, L. C. says:

"Now, before discussing the case of *Allen v. Flood* (4), and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides."

In *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd.* (5), Haldane, L. C., says:

"To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague. In this respect the previous decisions of a Court of co-ordinate jurisdiction are more binding in a system of jurisprudence such as ours than in systems where the paramount authority is that of a Code. But when a previous case has not laid down any new principle but has merely decided that a particular set of facts illustrates an existing rule, there are few more fertile sources of fallacy than to search in it for what is simply resemblance in circumstances, and to erect a previous decision into a governing precedent merely on this account. To look for anything except the principle established or recognised by previous decisions is really to weaken and not to strengthen the importance of precedent."

It seems to me that the principle established or recognised in the decisions, in which the expressions relied on occur, is this, namely, that in many suits brought by or against Hindu widows the widow can and does fairly represent not only herself but the estate, and that the doctrine of *res judicata* should be applied in all such cases where the reversioner seeks to reopen decided questions. The reason and justice for the principle is absent in any case where for any cause the widow did not in truth represent the estate. In my judgment, the Rani in her suit could not and did not represent the Ladhaura Estate. The Courts in India and also their Lordships

(3) [1901] A. C. 495=70 L. J. P. C. 76=85 L. T. 289=50 W. R. 139=65 J. P. 708=17 T. L. R. 749.

(4) [1898] A. C. 1=77 L. T. 717=46 W. R. 258=67 L. J. Q. B. 119=60 J. P. 795=14 T. L. R. 125.

(5) [1914] A. C. 25=83 L. J. Ch. 79=109 L. T. 802=58 S. J. 97=30 T. L. R. 114.

of the Privy Council held that she had estopped herself from denying her authority to adopt the defendant. If she performed a ceremony of adoption without authority it was an act against the estate, yet she was not allowed to prove the true facts. As the result of her conduct the Courts in India refused to admit evidence which she tendered to show that she could not adopt the defendant. Much as I regret the protraction of the present litigation I think that the suit should be remanded to the Court below.

Banerjee, J.—This appeal arises out of a suit relating to the Landhaura Raj, which is a large estate of great value. It has unfortunately been the subject of considerable litigation, which commenced so far back as the year 1872. The last Raja was Raghubir Singh, who died in 1863 leaving a widow, Rani Dharam Kunwar. A posthumous son was born to him, who died shortly afterwards. The history of the estate and of the previous litigation relating to it is given in the judgment of this Court delivered on 10th December 1903 and it is also set forth in the judgment of the Court below. Rani Dharam Kunwar was in possession of the estate after her husband's death till she died on 12th November 1912. She made successive adoptions, the last of which is alleged to have been made in January 1899, when she is said to have adopted the defendant, Balwant Singh, the boys previously adopted having died. Disputes however arose between her and Balwant Singh and a suit was brought by her on 9th January 1905 for a declaration that she had not in fact adopted Balwant Singh, that even if she did adopt him she had no authority from her husband to do so and that for this and other reasons the adoption was invalid. The Court of first instance found that Balwant Singh had in fact been adopted, but it was of opinion that Rani Dharam Kunwar was estopped from questioning the validity of the adoption and accordingly dismissed the suit, without trying other issues or recording oral evidence in regard to them. This decision was affirmed by this Court on appeal. The judgment of this Court is reported as *Dharam Kunwar v. Balwant Singh* (6).

(6) [1908] 30 All. 549=5 A.L.J. 563=(1908) A. W.N. 231.

From this judgment an appeal was preferred to the Privy Council. Their Lordships agreed with this Court as to the factum of adoption but proceeded to determine the question :

"whether the Rani had authority from her husband to adopt the defendant."

Upon a consideration of the documentary evidence, of which there was a considerable amount on the record, their Lordships came to the conclusion that authority to adopt had been proved. In their opinion the question might "well be decided as one of fact * * * without recourse to the doctrine of estoppel."

Their Lordships however did not differ from the Courts below in the view they had taken of that doctrine, but they observed as follows :

"Of course the estoppel pleaded against the Rani must be taken as purely personal. It does not bind any one who claims by an independent title, but in view of the decision now given, that the respondent was, in fact, duly adopted, further litigation on the point may be taken as happily out of the question."

It is clear from these observations that their Lordships were of opinion that their decision on the question of the validity of the adoption would be binding on reversioners who claimed independently of the Rani.

In spite of this decision of their Lordships the present suit was brought by plaintiff 1, with the help of plaintiff 2, who is apparently a speculator financing the litigation, for possession of the estate on the same grounds as those on which Rani Dharam Kunwar had based her claim, namely, that Balwant Singh had not in fact been adopted and that the Rani had no authority to adopt. Plaintiff 1, Risal Singh, alleges himself to be the next reversioner to the estate and he has transferred one-half of his alleged rights to plaintiff 2, Fateh Chand. The title of Risal Singh as reversioner is denied on behalf of the defendants, but the Court below has not tried that question and, on the assumption that he is the reversioner, has dismissed the suit on the ground that he is bound by the decision of their Lordships of the Privy Council in the suit of the Rani. The plaintiffs have preferred this appeal, and the only question argued before us is whether that decision is binding.

I agree with the Court below in holding that the decision of their Lordships in that suit is binding on the reversioners. The law on the subject has, in my

opinion, been correctly stated by the learned Subordinate Judge. Where the estate of a deceased Hindu has vested in a female heir, a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heirs. Where however the decree relates to a matter personal to her, it is not so binding. The earliest authority on the point is the well known case of *Katama Natchuar v. Raja of Shivagunga* (7). In dealing with the question whether a decree, obtained in 1847, in the lifetime of the widow in possession would have bound those claiming in succession to her, their Lordships of the Privy Council held as follows:

"Their Lordships are of opinion that unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit . . . by any person claiming in succession to her. For assuming her to be entitled to the zamindari at all, the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow (at p 604)."

The principle thus enunciated by their Lordships was re-affirmed by them in several subsequent cases. I may refer to *Jugal Kishore v. Jotendro Mohun Togore* (8), *Partab Narain Singh v. Triloki Nath Singh* (9), *Harmath Chatterji v. Mothur Mohun Goswami* (10). It has been accepted and acted upon by all the High Courts in this country. The cases on the point are collected on p. 910 of Mayne's Hindu law, Edn. 8 and as most of them are set forth in the judgment of the Court below, I deem it unnecessary to refer to them. The principle laid down by the Privy Council was thus summarised by Sir

Barnes Peacock, C. J., in his judgment in the Full Bench case of *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* (11):

"In the absence of fraud or collusion a decision against a widow, with regard to her deceased husband's estate, would be binding upon the reversionary heirs (at p. 507)."

It is true that the circumstances of all the cases were not identical but in all of them the principle was recognized. As observed by Lord Haldane, L. C., in the recent case of *Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd* (5) decided by the House of Lords: "the binding force of previous decisions, unless the facts are indistinguishable, depends on whether they establish a principle. To follow previous authorities, so far as they lay down principles, is essential if the law is to be preserved from becoming unsettled and vague."

The decisions of the Judicial Committee (acted upon as they have been by the Courts in this country), having laid down a principle, it is essential that they should be followed by us so as not to unsettle what has hitherto been understood to be the law on the point.

We have next to consider whether this principle applies to the present case. Rani Dharam Kunwar claimed to be in possession of the Landhaura Estate either as the widow of her deceased husband or as the mother of her son. It is in her capacity as the person who represented the estate that she instituted the suit brought by her against Balwant Singh. He was claiming title to the estate as the validly adopted son of Raja Raghubir Singh and the object of the suit was to protect the estate from that claim. In her plaint in that suit she alleged that upon the death of her son she obtained possession of the whole of the estate as his heir and continued in possession as such. In the fourth ground of her appeal to this Court she stated that:

"in her character as representing the estate of her son, Jagat Prakas Singh, she was at liberty to repudiate"

the alleged adoption of the defendant. Again, in the 23rd ground of her appeal to His Majesty in Council she asserted that she was not "precluded from bringing a suit as representing the estate of the husband." It is manifest from these statements that she brought her suit as representing the estate and not in a personal capacity. She sought to es-

(11) [1868] 9 W. R. 505.

(7) [1861-63] 9 M. I. A. 539=2 W. R. 31=1 Sath 520=2 Sar. 25=19 E.R. 843 (P.C.).

(8) [1884] 10 Cal. 985=17 I. A. 66=4 Sar. 553 (P.C.).

(9) [1885] 11 Cal. 186=11 I. A. 197=4 Sar. 567 (P.C.).

(10) [1894] 21 Cal. 8=20 I. A. 183 (P.C.).

establish that Balwant Singh was not validly adopted and that he had no right to the estate. By asserting a valid adoption he was casting a cloud on the title of the Rani as representative of the estate and on that of the reversioners who were to come after her, and it was to remove this cloud that she instituted her suit. In the point in this case the plaintiffs also have stated that she was in possession as a Hindu widow. As she did not set up any right other than that of a widow or mother and as her right was thus limited to an estate for life, her suit was in substance a suit for the protection of the interests of the reversioners, on whom the property would devolve after her death. The final decision in that suit is therefore binding on them, in the absence of fraud or collusion. It has not even been suggested that there was fraud or collusion between the Rani and Balwant Singh. Having regard to the relations which existed between them, to the fact that they were at arm's length, to the earnest manner in which the suit was fought out in this country before the Judicial Committee, the idea of fraud or collusion is out of the question.

The main ground on which the learned counsel for the appellants contends that the decree in the former suit is not binding on the appellants, is that in that suit the trial Court did not go into evidence on the question of authority to adopt. That Court, it is true, decided the case on the ground of estoppel and refused to record oral evidence on the issue as to authority. This Court also decided the case on the same ground. Had the matter rested there and had the Rani's suit been finally decided on the ground of estoppel only, the decision would have been on a ground personal to the Rani and would not have been binding on the reversioners. But when the case went before the Privy Council, their Lordships preferred to decide the question of authority and the validity of the adoption as one of fact "without recourse" as their Lordships observed, "to the doctrine of estoppel." Their Lordships were fully cognizant of the fact that oral evidence had not been recorded on the point but in spite of this they proceeded to decide the question on the documentary evidence before them.

The Rani was represented before their Lordships by eminent counsel and it must be presumed that they urged every point that could be reasonably put forward. It may be that in view of the length of time which had elapsed since the death of Raja Raghubir Singh their Lordships considered, as also did the learned counsel who presented the Rani's case before them that oral evidence would be of little value. To take an extreme view, it may also be (if I may say so without presumption) that their Lordships decided the case erroneously. The fact however remains that their Lordships proceeded to try the question on the merits and decided it in favour of the defendant. It cannot under the circumstances be said that there was not a fair trial. That the possibility of claimants coming forward as reversioners was present to their Lordships' minds is clear from their judgment, and when they said that "in view of the decision now given that the respondent was in fact duly adopted, further litigation on the point may be taken as happily out of the question,"

they clearly meant that their decision would be binding on reversioners and the validity of Balwant Singh's adoption would be for all time beyond the region of controversy. To hold otherwise would be to render their Lordships' decision wholly nugatory and it would be open to as many claimants as might assert themselves to be reversioners to reopen the question a number of times and to harass the defendant repeatedly. In this connexion I may also point out that in the case of *Jugal Kishore v. Jotendro Mohan Tagore* (8), referred to above, the Judicial Committee held a decree, and an auction sale which followed, to be binding, although the widow against whom it was passed did not appear and the decree was made ex parte and this circumstance did not in the opinion of Lordships render the decree any the less binding.

It may be that the rule of res judicata as enacted in S. 11, Civil P. C., is not strictly applicable, as the plaintiffs were not parties to the previous suit and do not claim under a party to that suit. But in the *Katama Nabhar's* case (7) their Lordships held a decree obtained against the widow in possession to be binding on reversionary heirs on the ground of convenience. The decree being

binding on the estate binds all persons who succeed to the estate.

In my judgment, the decree passed by the Privy Council in the suit brought against Balwant Singh by Rani Dharam Kunwar is, on the above grounds, binding on the reversioners and this suit is not maintainable. I would dismiss the appeal.

(As the learned Judges differed, the case was referred to Chamier, J., who delivered the following judgment.)

Chamier, J.—This appeal was referred to me under S. 98, Civil P. C., in consequence of a difference of opinion between the learned Chief Justice and Banerji, J. The point upon which they differed is, whether the decision of their Lordships of the Privy Council in the suit of Rani Dharam Kunwar against the defendant-respondent, Balwant Singh, to the effect that the Rani duly adopted Balwant Singh under authority given to her by her husband, is binding upon the plaintiff appellant, Risal Singh, who claims to be the reversionary heir of the husband and entitled to the estate on the death of the Rani which occurred in November 1912, a few months before the present suit was brought.

In the previous suit the Court of first instance declined to take evidence (or rather oral evidence, for the parties were required to put in their documentary evidence) on the question, whether the Rani had authority to adopt Balwant Singh, and dismissed the suit on the ground that the Rani was estopped from disputing her alleged authority to make the adoption, the factum of which is beyond dispute. This Court also decided the case on the question of estoppel confirming the decree of the first Court. The Rani appealed to His Majesty in Council, one of the grounds taken in the application for leave to appeal being that the first Court should have allowed her to give evidence on the question of her authority to make the adoption. A similar ground was taken in her appeal to this Court. Their Lordships of the Privy Council agreed with the Indian Courts that the Rani was estopped from denying that she had authority to adopt Balwant Singh, but they observed that the estoppel was purely personal and would not bind anyone who claimed by an independent title. They however as I read the judgment, decided, and intended to decide, that the evidence showed

that the Rani had authority to adopt Balwant Singh. I think that this is clear not only from the passages quoted by Banerji, J., but also from earlier portions of the judgment, for example the passage in which they say :

"He gave formal and emphatic directions to his wife in regard to the adoption of a son. The Rani herself has pledged her word as to the nature and scope of those directions on more than one public and important occasion. She did so particularly in the deed of 18th January 1899 and in her defence to the action of one Baldeo Singh."

Then later on their Lordships say that "in reviewing the facts of the case, they are of opinion that the question may well be decided as one of fact on the Rani's own statements without recourse to the doctrine of estoppel. In their view she was speaking the truth in Baldeo Singh's action when she was pleading as to her authority."

The learned Chief Justice is of opinion that, though in his view the Rani's conduct rendered it difficult for her to fairly represent the estate, it might perhaps be conceded that the finding of the Privy Council would have operated as *res judicata* had the evidence as to the Rani's authority to adopt been admitted and recorded. But he thinks it is clear that, if their Lordships' attention had been called to the fact that the first Court had declined to receive evidence, they would never have decided the case on the question of fact so as to bind the estate. It seems to me that, if there was any misapprehension as to the proceedings of the first Court, that might be a ground for a review of judgment, but is no ground for holding that a clear and definite decision on the question of fact is not binding on the estate. A Court may refuse to summon witnesses or admit evidence, and, when its decision is subsequently relied upon as constituting a question *res judicata*, the Court trying the subsequent case cannot disregard the decision because it thinks that the Court trying the earlier case ought to have summoned the witnesses or admitted further evidence. In my opinion, the Rani in the previous case represented the estate. Upon this I have nothing to add to what Banerji, J., has said. The Rani wanted to give evidence on the question of her authority, and both in appeal to this Court and in her application for leave to appeal to His Majesty in Council she complained of the action of the Court in refusing to admit that evidence. Therefore there can be no doubt that she

was doing her best to show that there had been no valid adoption, and her action was in the interest of the reversionary heir of her husband. The reports of the case in the Law Reports, Indian Appeals and in the Indian Law Reports are not as full as in the Allahabad Law Journal and the Calcutta Weekly Notes. The last mentioned report : [see *Rani Dharam Kunwar v. Balwant Singh* (12)], represents Sir Robert Finlay as having contended that the appeal to their Lordships was confined to the applicability of the doctrine of estoppel and their Lordships as having then intimated that in their opinion there were sufficient materials on the record to decide all questions arising in the suit. Whether counsel for the appellant acquiesced in this view or not it is impossible to say, but the judgment of their Lordships makes it clear that the question of the Rani's authority to make the adoption was argued. The report in the Calcutta Weekly Notes only makes clear, what one would infer from the other reports, that whether counsel for the appellants were willing to do so or not their Lordships deliberately decided to take up the question of the Rani's authority to make the adoption. It is impossible to suppose that neither counsel for the appellant nor their Lordships were aware that the first Court had declined to take oral evidence on the subject. A perusal of the record shows that notwithstanding the order of the Court there was before their Lordships a mass of evidence bearing on the question of the Rani's authority to adopt. What was shut out must have been mainly oral evidence as to the events which had happened many years ago, and it is quite possible that counsel for the Rani in deference to the opinion of their Lordships did not press the contention that the Rani should be allowed a further opportunity of giving evidence. However that may be, I think it is clear that their Lordships deliberately decided the question, knowing full well that their decision would bind the reversioners and in the hope that their decision would put a stop to further litigation.

I am of opinion that the decision of their Lordships is binding on the plaintiffs in the present suit and justifies the

(12) [1913] 15 I. C. 673.

dismissal of the suit without trial on the merits.

Let the record be laid before the Chief Justice.

By the Court.—This appeal having now been disposed of under the provisions of S. 98, Civil P. C., the order of the Court is that the appeal be dismissed with costs.

V.B./R.K.

Appeal dismissed.

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PIGGOTT, J.

Ishar Dutt and another — Plaintiffs—Appellants.

v.

Musai Dube and others—Defendants—Respondents.

Second Appeal No. 561 of 1914, Decided on 15th November 1915, from decision of Addl. Dist. Judge, Gorakhpur, D/- 26th May 1914.

Civil P. C (5 of 1908), O. 41, R. 4—Separate appeals by two sets of defendants — One dismissed, the other allowed, and suit dismissed against all defendants—Court was competent to do so.

The plaintiff filed a suit for possession against two sets of defendants and obtained a decree in the first Court. Both the sets of defendants filed separate appeals on different dates. The appeal filed by one set of defendants was heard and dismissed. Subsequently the appeal filed by the other set of defendants was taken up. The Additional District Judge who heard the latter appeal, being of opinion that the plaintiff had no title to the property, dismissed the suit as against all the defendants.

Held, that the Judge had the discretion under O 41, R. 4, Civil P. C., to dismiss the suit as against both sets of defendants.

[P 268 C 2]

Parmeshwar Dayal —for Appellants.

Girdhari Lal Agarwala —for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for recovery of possession over immovable property. In the array of parties originally impleaded there were five defendants of the first party, seven defendants of the second party and one defendant of the third party. Of this last it is sufficient to say that she was alleged to have joint right with the plaintiffs to the property in suit, and was impleaded because she declined to join in the suit. The plaint does not disclose any difference in the position of the defendants first party and the defendants second party except in so far as it alleges that the defendants first party have filed a collusive suit against the defendants second party. On the ques-

tion of the existing possession over the property in suit the plaint merely says that the possession of the defendants first party and second party is wrongful. The Court of first instance decreed the suit on 20th September 1912. Separate appeals were filed by the defendants first party and by the defendants second party. The appeal of the former was filed on 18th November 1912 and that of the latter was filed on 26th November 1912. This appeal was transferred to the Court of the Additional District Judge of Gorakhpur sitting at Basti, and was dismissed by him on 4th February 1913. In the meantime the appeal of the defendants first party remained pending, its connexion with the other appeal having apparently been overlooked.

It was however transferred to the Court of the Additional District Judge and was disposed of, on 26th May 1914, by the successor of the learned Additional District Judge who had dealt with the appeal of the defendants second party. On the most important issue of fact in the case, an issue which involved the entire title of the plaintiffs to the property in dispute, the learned Additional Judge, who held charge of that office in the month of May 1914, came to a conclusion diametrically opposite to that arrived at by his predecessor in the month of February 1913. Finding that the plaintiffs had failed to prove their title to the land in dispute he accepted the appeal of the defendants first party and dismissed the suit altogether. The plaintiffs have come to this Court in second appeal. The plea taken to the effect that the District Judge of Gorakhpur had no jurisdiction to decide the appeal seems to be based on some misapprehension. The plea to the effect that the decision of 4th February 1913, operates as *res judicata* against the defendants first party seems to me quite unsustainable. It was a decision to which they were no parties, and it was actually arrived at while the question in issue was under adjudication on the appeal filed by them on 18th November 1912. It was further contended that, in any case, the Additional District Judge who decided the appeal of the defendants first party ought not to have dismissed the plaintiffs' suit altogether, but should have so framed his decree as to maintain for the plaintiffs the benefit

of the dismissal of the appeal brought by the defendants second party. The course taken by this litigation on the lower appellate Court was certainly unfortunate and the result arrived at appears anomalous. Nevertheless I am not clear that the plaintiffs are entitled to any relief from this Court.

They are themselves mainly responsible for the curious result of the litigation in the lower appellate Court. The defendants first party and the defendants second party had each availed themselves independently of a right undoubtedly secured to them by O. 41, R. 4, Civil P. C., that is to say, each set of defendants had appealed from the whole decree, on the ground that the said decree proceeded upon a ground which was common as against all the defendants. There is no necessary presumption that either set of defendants was cognizant of the filing of the appeal by the other set. The plaintiffs on the other hand must have received notice of both the appeals, and it was apparently remiss on their part, as it was certainly unfortunate for them, that they did not invite the attention of the Court below to the advisability of hearing both the appeals together. As matters turned out the Additional District Judge who took cognizance in the month of May 1914 of the appeal filed by the defendants first party was possessed of the discretion reserved to a Court of appeal by O. 41, R. 4 above referred to. Having decided against the plaintiffs a point which went to the root of their title, it would certainly have been anomalous for him to so frame his decree as to allow the plaintiffs to claim possession against one set of defendants. If the defendants second party had never filed an appeal at all the decision of the Court of first instance would have become final against them. Yet the appellate Court would have been clearly entitled to exercise, on the appeal of the defendants first party, the discretion conferred upon it by O. 41, R. 4, Civil P. C. There is no provision of law which lays down that this discretion is taken away in the event of an unsuccessful appeal by one defendant or set of defendants, and I do not find myself able to formulate any principle of law which would take away that discretion. The dismissal of the appeal filed by the defendants second party in no way affects the principle

that the decree of the Court of first instance had not become final against the defendants first party so long as their appeal against the same remained undisposed of on the file of the Additional District Judge of Gorakhpur, and if that decree had not become final it remained subject to the discretion conferred upon an appellate Court by O. 41, R. 4, Civil P. C. This appeal therefore fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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TUDBALL AND PIGGOTT, JJ.

Ram Ugrah Pandé and others—Plaintiffs—Appellants.

v.

Achraj Nath Pandé and others—Defendants—Respondents

First Appeal No 99 of 1915, Decided on 29th November 1915, from order of 2nd Addl. Sub-Judge, Basti.

Civil P. C. (5 of 1908), Sch. 2, Cls 17 and 20—Agreement to refer to arbitration pending mutation—Award given—Party aggrieved took up matter before Board who remanded for trial de novo—Application under Cl. 17 held not proper as stage contemplated was passed—Application under Cl. 20 was barred—Ss. 5 and 14, Lim. Act, held not applicable—Limitation Act (9 of 1908), Ss. 5, 14 and Art. 168.

After the death of a certain Hindu, disputes arose among the various branches of his family as to their title. One branch alleged separation and the other branch alleged that the family was still joint. It appeared that the family was possessed of shares in a number of villages in two tahsils, some of the villages standing in the names of some of the members and others in the names of other members. An application for mutation of names was made in regard to each village. In the case of one tahsil application for mutation was made to the tahsildar, while in the case of the other to the Assistant Collector. The parties, subsequent to the institution of proceedings, executed agreements to refer their disputes as to the title to the land to arbitration. These agreements were placed before the respective officers and all files were sent to the arbitrator. The arbitrator filed an award. At a subsequent stage of the case, he was directed to file another award which he did in exactly the same terms and bearing a later date. The respondents were not satisfied with the award and the matter went up to the Board of Revenue, which sent the cases back to be tried de novo without regard to arbitration. Upon this the appellants filed applications under Cls. 17 and 20, Sch. 2, Civil P. C.

Held: (1) that Cl. 17, Sch. 2, Civil P. C., could not operate in the circumstances of the present case as the facts had gone beyond the stage contemplated by that clause; (2) that the application under Cl. 20, Sch. 2, Civil P. C., was

barred under Art. 178, Sch. 1, Lim. Act, as it was made more than a year after the date of the award and as it was impossible either under S. 5 or S. 14, Lim. Act, to extend the time so as to enable the present application to be treated as made within time. [P 371 C 1, 2]

Jang Bahadur Lal for Durga Charan Banerji—for Appellants.

Surendra Nath Sen and Lakshmi Narain Tiwari—for Respondents.

Judgment.—This is an appeal arising out of an application made in the Court below, which was primarily based on Cl. 17, Sch. 2, Civil P. C. While the matter was pending, an application for amendment was made and an alternative relief was asked for under Cl. 20 of the same schedule. The lower Court has refused both the reliefs. The first relief which was claimed under Cl. 17 it rejected on the ground that an award had been made by the arbitrator on the basis of the agreement between the parties and that Cl. 17 could not apply, the matter having attained a stage beyond that contemplated by that clause. With regard to the relief claimed under Cl. 20 it rejected it on the ground that the application was barred by time under Art. 178, Sch. 1, Lim. Act.

The applicants have come here on appeal. The parties are the descendants of one Prag Pandé. The latter had five sons, one of whom died childless. All the others have now died. Sheomangal has left three sons who are parties to the present dispute. Hansraj has left five sons and a widow who are also parties to the present dispute. Kedar Nath left a widow Mt. Sonkali and three daughters; of these the former alone is a party to the dispute. Gokul Nath has left a widow, Mt. Dirka, and three daughters and the former only is a party to this dispute. It appears that the family was possessed of shares in a number of villages lying in the two tahsils of Basti and Khalilabad in the Basti District. Some of the villages stood in the names of some of the members, and others stood in the names of other members. After the death of Kedar Nath, a dispute arose amongst the various branches as to their title. One branch alleged separation, the other branch alleged that the family still remained joint. An application for mutation of names was made in regard to each village. In the case of the Basti villages, the applications were

made in the regular way to the Tahsildar Assistant Collector. In the case of the Khalilabad villages, the applications appear to have been made in the Court of the Assistant Collector who was in charge of the pargana. In the Basti cases, 18th November 1912 was fixed by the Tahsildar. In the Khalilabad cases, the 2nd December was fixed by the Pargana officer. On 18th November the parties executed an agreement to refer their dispute as to the title to the land to the arbitration of one Rameswar Dat Man Tewari.

This agreement clearly sets out that the parties have a dispute as to their title to the family property, that they refer the dispute to the arbitrator, that they will abide by his decision, that they will take possession of their various shares according to his decision, and that they will cause mutation of names to be made according thereto. Apparently the agreement was put before the tahsildar and was filed on the record of the case before him. He adjourned the mutation case clearly with a view to enable the parties to settle their dispute by means of arbitration. He fixed a date directing them to settle that dispute, but also laying down that if the disputes were not settled by the date so fixed, then they were to be prepared to produce evidence in connexion with the mutation case. On 2nd December 1912, the date fixed by the pargana officer in the case before him, a similar agreement written exactly in the same language and bearing date 2nd December 1912 was filed before the Pargana Officer, Khalilabad. Under orders of the Collector the Pargana Officer of Khalilabad was directed to decide both sets of cases, namely, the Basti and the Khalilabad cases. The Pargana Officer of Khalilabad sent all his files to the Tahsildar of Basti and told him to send the agreement to arbitrate to the arbitrator. This clearly was done, for on 18th February 1913 the arbitrator filed an award bearing date 8th February 1913. It appears that at a subsequent stage of the case he was directed to write out another award and that he did draw up an award worded exactly in the same language as the first one simply bearing a different date. One of the parties, the respondents to the present appeal, apparently was not pleased with the deci-

sion of the arbitrator. The mutation cases were fought up to the Board of Revenue which finally sent back the records of the mutation cases with directions to try them de novo without any reference whatsoever to the arbitration proceedings. The present appellants then filed the present application out of which this appeal has arisen in the civil Court. Primarily, as we have noted, it was an application under Cl. 17 of the schedule asking that the agreement to arbitrate, of 18th November 1912, should be filed in Court. Subsequently an alternative relief was prayed by the subsequent amendment asking that the award dated 8th February 1913 be filed in Court and that a decree be passed based on the same. We have heard considerable argument as to whether or not the Tahsildar of Basti or the Pargana Officer of Khalilabad had or had not power to refer the matter to the arbitrator. We have not been shown any written application by the parties to either of those officers asking them to make the reference to the arbitrator. It is quite clear that the agreement of 18th November 1912, was an agreement made entirely out of Court. It is an agreement to refer to the arbitrator the disputed question of title, i. e., a question which the revenue Court was not competent to decide in the cases then pending before it. It was not an agreement to refer the mutation case or cases to an arbitrator.

It is an agreement on which the arbitrator, if the parties had referred the matter at once to him directly, would have been empowered to take the evidence of the parties and to make an award. It seems to us immaterial whether or not the Tahsildar or the Pargana Officer had or had not legal power as a revenue Court to refer the agreement to the arbitrator. It is quite clear that the Tahsildar forwarded it to the latter with the full consent of the parties. If therefore there was any illegal reference under the Revenue Act it does not concern this present case. An agreement to arbitrate and a valid agreement was made out of Court and by the wish of the parties, it was sent on to the arbitrator by the Tahsildar, as indeed it might have been forwarded through any private person. It is an admitted fact that the arbitrator made an award. It

is therefore quite clear that Cl. 17, Sch. 2, Civil P. C., cannot operate in the circumstances of the present case. The facts have gone beyond the stage contemplated by the clause. In regard to Cl. 20 of the schedule, in so far as the application is based thereon, the question is whether or not the application is barred by time. Admittedly Art. 178, Sch. 1, Limitation Act, applies, and that lays down a period of six months from the date of the award. The present application was made more than a year after the date of the award. *Prima facie* it is therefore barred by limitation. A certain amount of stress has been laid on Ss. 5 and 14, Limitation Act. S. 5 clearly cannot apply. If the present proceedings be deemed to be based on application and not to be a "suit," S. 5 does not apply as that only relates to an appeal or an application for review of judgment or for leave to appeal or any other application to which this section may be made applicable by any enactment or rule for the time being in force. No enactment or rule can be shown which would make this section applicable to an application of the present description. On the other hand, if the present matter be deemed to be a suit within the meaning of S. 14, it is equally clear that the present appellants are not entitled to exclude the time during which they were prosecuting the mutation cases in the revenue Court. The present application is an application to have an award filed and a decree passed on the basis of that award. The matter in controversy in the revenue Court was not of this description. It was merely a mutation matter with a totally different cause of action as its basis. The present application is based upon the fact that there was an agreement to arbitrate and an award made upon that agreement. The two proceedings cannot be said to be founded on the same cause of action.

There remains the question which we need not decide, as to whether the proceeding in the revenue Court was a suit within the meaning of S. 14, although on that point there is a ruling in *Muhammad Subhanullah v. Secy. of State* (1), which is against the present appellants. It is therefore impossible for us, either under S. 5 or S. 14, Limita-

tion Act, to extend the time so as to enable the present application to be treated as made within time. We note that the respondents plead before us in argument that both the agreement and the award were *prima facie* legal and binding subject to any objection which could be raised on the ground of fraud or misconduct of the arbitrator etc., The Court below has found that both the agreement and the award were valid and that the present application was barred by time. With this we find ourselves in agreement. The result therefore is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 371

RICHARDSON, C. J. AND BANERJI, J.

Daud Ali Shah and others—Plaintiffs—Appellants.

v.

Ram Prasad and others—Defendants—Respondents.

First Appeal No. 220 of 1913, Decided on 1st June 1915, from decree of Addl. Sub-Judge, Aligarh, D/- 18th March 1913.

Civil P. C. (14 of 1882), S. 276—Execution struck off as process fee not paid—Attachment continues—Transfer pending, attachment is void.

A decree was passed against a certain person and his property was attached. While an appeal against this decree was pending in the High Court the application for execution (under the old Code of Civil Procedure) was struck off on account of the decree holder's default in not paying the process fees. After this the judgment-debtor made a gift of the property.

Held, that under the old Code the attachment was not withdrawn by reason of the dismissal of the application for execution and the transfer made by the judgment-debtor was void.

[P 372 C 1]

A. E. Ryves and Iqbal Ahmad—for Appellants.

Sunder Lal, Tej Bahadur Sapra and Lakshmi Narain—for Respondents.

Judgment.—The plaintiffs' predecessor-in-title obtained a decree for mesne profits against Hayat Ali Shah and others on 28th August 1905. On 11th June 1906, he applied for execution of the decree and on 23rd July 1906, certain property of the judgment-debtors was attached. The execution case was struck off on 18th April 1907 by reason of the decree-holder's default in paying certain requisite fees. Meanwhile an appeal from the decree was pending in

the High Court. After the disposal of the appeal the decree-holders applied for the revival of the execution proceedings on 16th July 1909 and they prayed for the sale of the property which had already been attached. On 18th August 1908, Hayat Ali Shah made a gift of the attached property in favour of his mother who on 16th February 1909, sold the said property to the principal respondents. Upon the objection of those respondents the Court released the attachment and thereupon the suit, out of which this appeal has arisen was brought by the plaintiffs for a declaration that they were entitled to proceed against the attached property on the ground that the gift and the sale were void as against them as the property had been attached on 23rd July 1906 and the transfers were made pending the attachment. The question to be considered is whether the property should be deemed to have been under attachment on the date on which the gift by Hayat Ali Shah in favour of his mother was made.

On behalf of the defendants it is contended that the striking off of the execution proceedings should raise a presumption that the attachment had been withdrawn. Under the present Code of Civil Procedure, if an application for execution is dismissed for default, it must be deemed that the attachment was withdrawn, but there was no such provision in Act 14 of 1882, which was the Code of Civil Procedure applicable at the time when the execution case was struck off on 18th July 1907. It has been held by this Court in a number of cases that unless there is a clear order withdrawing the attachment, the presumption will be that the attachment continues. No doubt in some cases the opinion has been expressed that the question is one of the intention of the Court and the parties. If we were to consider the case from that point of view, it is clear that the intention of the Court was to maintain the attachment, for we find that when an application was made to revive the execution proceedings, the Court held, on 2nd August 1909, that no further attachment was necessary and that the property was already under attachment. The delay which had taken place in following up the attachment is explained by the fact

that an appeal was pending from the original decree in the High Court. We think the Court below was wrong in holding that the property was not under attachment when the gift in favour of the judgment-debtor's mother was made. That gift having been made during the pendency of an attachment was void against the attaching creditor and the sale made by the donee falls with it. It was urged on behalf of Hayat Ali Shah that he was not a party to the original suit and that it was through an error that his name appears in the array of judgment debtors. It is admitted that the decree for mesne profits was passed against him. We allowed him an opportunity of getting the decree amended if his statement was true, but we are informed that the application made by him has been rejected. We must hold that Hayat Ali Shah was a person against whom the decree sought to be executed was passed. We allow the appeal, set aside the decree of the Court below and decree the plaintiffs' claim with costs in both Courts, including fees in this Court on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 372

PIGGOTT, J.

Emperor

v.

Ram Sarup—Opposite Party.

Criminal Reference No. 302 of 1915, Decided on 30th April 1915, made by Sess. Judge, Bareilly.

Agra Tenancy Act (2 of 1901), S. 51—Order of suspension or remission deprives the landholder's right of suit—No offence if he recovers by lawful means—Penal Code (45 of 1860), S. 188.

An order suspending or remitting arrears of rent is not an order prohibiting the landholder from receiving the same if tendered or attempting to realize the same by lawful means.

Therefore a landholder endeavouring to collect suspended arrears by process of distraint is not guilty of an offence under S. 188, I. P. C.

Its effect is simply to deprive him of his right of suit in respect of the arrears remitted or of the suspended arrears during the period of suspension. [P 374 C 2]

Reference.—Ram Sarup, a Zamindar of Mauza Darabnagar, has been tried summarily and convicted of an offence under S. 188, I. P. C., in that he distrained and attempted to collect rents for 1321 Fasli in October 1914 (1322 Fasli) in disobedience of an order of the

Collector of which he had cognizance; that the payment of those rents had been suspended.

He has been fined Rs. 150 and this is an application for revision.

The first ground is that S. 188 cannot apply to the facts of the case, and this is expanded in ground 4, that there is no proof that the disobedience caused any obstruction, annoyance or injury.

It is, I think, a little unfortunate that a test case of this nature should have been tried summarily. Apparently the only evidence taken was that of the wasil-baqi navis who proved the orders suspending rent signed by the zamindar. What exactly Ram Sarup did is not clear but from a report of the Deputy Collector, dated 23rd November 1914, as a result of which these proceedings were initiated, it appears that Ram Sarup distrained many holdings of the tenants for the arrears of rent without deducting the amount of suspended rent of 1321 Faslī. These tenants filed a complaint against the zamindar.

The fact of the distraint seems to have been admitted by Ram Sarup, for in his examination he seeks to excuse himself for his conduct, and does not deny it. The order of suspension was lawfully promulgated by the Collector under S. 51, Tenancy Act. That order was disobeyed, the attempt to collect the suspended rents by distraint amounting to a disobedience. Nor can it be argued that disobedience did not cause obstruction and annoyance to the tenants concerned though it would have been well to take the evidence of the tenants. I should not, therefore, be prepared to recommend revision of the finding and sentence on this view of the facts alone.

But their legality is, I think, open to question on the grounds stated in paras. 2 and 3 of the application for revision.

Section 51, Tenancy Act, provides a special remedy for the disobedience to the order, and in cases of failure to comply with the direction of a statute the special remedy provided by the statute should be followed and no other can be supposed to exist (Ref. Mew's Digest of English Case Law, 1911 Edition, Vol. 13, under "remedy given by a statute, how far exclusive" p. 1959).

Whenever there is an intention to apply the provisions of the criminal law to acts authorized or required by parti-

cular statutes, that intention is always made clear by express words to that effect. (Ref. Ratan Lal, Law of Crimes, 1911 Edition, p. 53, under S. 41, I. P. C.). S. 149, Tenancy Act, is an instance to this effect. The disobedience to an order of the Collector under S. 51 is nowhere in the Tenancy Act made a criminal offence. S. 26, General Clauses Act, it is true, enacts that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. Ram Sarup's act was an offence under S. 51, Tenancy Act, and it can, I think be held to come within the terms of S. 188, I. P. C. (I note however that the application for revision, ground 3, says that the punishment specified in S. 51 has been undergone).

But the principle referred to by me above that a special Act of the nature of the Tenancy Act is intended to be complete in itself as regards offences committed against the rent law is, in my opinion, the one that must prevail. It has been followed by the Courts in this country the ruling of *Chandi Pershad v. Abdul Rahman* (1) being an instance in point.

The result is that I consider that as the Tenancy Act provided a special remedy for disobedience to an order under S. 51 the Collector was not competent to sanction prosecution for an offence under S. 188, I. P. C., in respect of that disobedience.

Whether any action could have been taken on a complaint brought by one of the tenants concerned under some section of the Indian Penal Code is a matter which the Collector might have considered that was an alternative method of bringing home to the zamindar the consequence of his action which was most reprehensible, but the Collector, *qua* Collector, had, it seems to me, no remedy but that provided by S. 51 itself i. e., the immediate realization of the suspended revenue.

I therefore refer the case for orders of the Hon'ble High Court with the recommendation that the sentence be set aside and the fine refunded.

(1) [1895] 22 Cal. 131.

I further note that the Magistrate who tried the case had in a previous page of the proceedings expressed the opinion that Ram Sarup should, without doubt, be prosecuted under S. 188, I. P. C., and I think that in the circumstances it would have been better that some other Magistrate should have tried the case.

The report will be sent to the Magistrate for any explanation or remark that he may have to offer before submission to the High Court.

Judgment.—The facts disclosed by this order of reference are peculiar. Ram Sarup is a landholder of a village Darabnagar in the Bareilly District. By an order lawfully passed and promulgated under S. 51, Agra Tenancy Act, (Local Act 2 of 1901), a portion of the rents due from tenants of that village had been suspended. Ram Sarup was aware of the order of suspension, but he endeavoured to collect suspended arrears by process of distraint. He has been prosecuted for having disobeyed an order promulgated by a public servant, lawfully empowered to promulgate such order, directing him to abstain from such act. The learned Sessions Judge has doubted the propriety of the conviction and the sentence of Rs. 150 fine which followed the prosecution and has referred the matter to this Court for orders. The effect of an order suspending or remitting rent under S. 51, Tenancy Act, already referred to, is not to prohibit the zamindar or zamindars affected by such order from collecting the same. This is obvious from sub-Cl. 5 of the said section which prescribes the consequences which will result in the event of a landholder's succeeding in collecting rents which have been suspended or remitted. If the tenants are in fact sufficiently well off to pay the suspended rents I cannot see that any principle of public policy is violated by permitting them to do so. The appropriate consequences will follow under the provisions of the Tenancy Act itself. It will be presumed that a mistake was made in suspending rents and land revenue in a village where the tenants are in fact able to pay, and the zamindar will become immediately liable for payment of the suspended arrears of land revenue. The difficulty in the present case seems to have arisen because of Ram Sarup's attempt to invoke the power

of distraint. The whole facts are not before me, and, moreover, the question whether distraint can lawfully be levied in respect of rents under suspension is one entirely within the jurisdiction of the revenue Courts. I should have thought myself that such distraints could be successfully contested by the tenants under S. 142, Tenancy Act, whereby the distrainer can be put to proof of his claim to the contested arrears just as if he were the plaintiff in a suit to recover the same.

It is expressly laid down that a suit for the recovery of suspended arrears of rent will not lie during the period of suspension. If I am mistaken in this view and I conceive it possible that some difficulty may have been felt by reason of the definition of what constitutes an "arrear of rent" given in S. 101, Tenancy Act, then the question of the re-drafting of the provisions of that Act relating to distraint deserves the attention of the Legislature. As regards the effect of S. 51, Tenancy Act, I feel no doubt whatever. An order suspending or remitting arrears of rent is not an order prohibiting landholder from receiving the same if tendered or from attempting to realize the same by lawful means. Its effect is simply to deprive him of his right of suit in respect of the arrears remitted or of the suspended arrears during the period of suspension. Ram Sarup either had a right in law to distrain for these suspended arrears or he had not. I should have thought that he had not, and in that case the distraints levied by him can be set aside and he is liable to compensate the tenants inconvenienced thereby. If however, it be held that the suspension of arrears of rent does not deprive the landholder of his power of distraint during the period of suspension I am unable to hold that he is liable to punishment for availing himself of his legal right.

I set aside the conviction and sentence in this case: the fine, if paid, will be refunded.

V.B./R K.

Conviction set aside.

A. I. R. 1915 Allahabad 375 (1)

RICHARDS, C. J. AND RAFIQUE, J.
Munshi Lal—Plaintiff—Appellant.

v.

Mangat Bai—Defendant—Respondent.

Second Appeal No. 1291 of 1915, Decided on 1st November 1915, from decision of Addl. Dist. Judge, Saharanpur, D/- 4th May 1915.

Practice—Relief—Mortgage suit against mortgagor's son—Execution not proved—Money decree cannot be passed—Mortgage—Personal decree.

In a suit on a mortgage for sale of the mortgaged property against the son of the executant of the mortgage, the mortgage was not proved to have been duly executed.

Held, that under the circumstances no simple money decree could be given inasmuch as it would entirely change the cause of action. [P 375 C 2]

Gokul Prasad—for Appellant.

Judgment.—This appeal arises out of a suit on foot of a mortgage. The mortgage was executed by Govind and others. The suit is a suit (for sale of the mortgaged property) against the sons of Govind, who is now deceased. Both Courts below have dismissed the suit, first, upon the ground that the mortgage was not proved to have been executed according to the provisions of the Transfer of Property Act, and, secondly, on the ground that no legal necessity was proved. As to the first point, it is contended that the plaintiff should have had a further opportunity of proving the due execution of the bond. The Court below has dealt with this point and, in our opinion, the plaintiff ought to have come prepared to prove his case. We have looked into the record and we see that it never was suggested that the witness who was produced to prove the bond went back on his previous evidence or had committed perjury. He proved the plaintiff's case *prima facie*, but when he was cross-examined as to the particular mode in which he had witnessed the bond, the fact was disclosed that he had not seen the executants actually sign. The finding that there was no legal necessity is a finding of fact and is equally fatal to the plaintiff's suit as against the sons of Govind. It is contended that we ought to grant at least a simple money decree. There are several objections to this. In the first place, the suit was a suit for sale of mortgaged property. In order to give a simple money decree, we should either amend the plaint or treat the

plaint as amended. It is not a suit for money. In the next place it is sought now to get a simple money decree (not against the original executant) but against his sons. This would be an entirely new cause of action in which there might be entirely different defence. In our opinion, the findings of fact conclude the appeal. It is accordingly dismissed.

V.B./R.K.

Appeal dismissed

*** A. I. R. 1915 Allahabad 375 (2)**
Full Bench

RICHARDS, C. J., KNOX AND BANERJEE, JJ.

A Mukhtar, In the matter of.

Criminal Misc. Appln. No. 68 of 1915, Decided on 29th March 1915.

*** Legal Practitioners Act (18 of 1879). S. 13—Duty to stick to one side so far as possible—Appearance in appeal in assault case against servants of zamindar—Subsequent proceedings under S. 145, Criminal P. C., against his clients—Appearance for complainant against original clients in absence of offer by them did not amount to misconduct.**

A professional gentleman should, as far as possible, stick to the side who first employed him.

In a proceeding for an assault upon the servant of a zamindar, a mukhtar appeared for some of the accused to argue an appeal. Later on the zamindar brought proceedings under S. 145, Criminal P. C., against the accused for the same property a dispute about which led to the assault. The mukhtar appeared for the zamindar. The mukhtar's first client did not offer to employ him nor took any exception to his appearing in the case until the case was actually at hearing.

Held: that under the circumstances the mukhtar was not guilty of professional misconduct. [P 376 C 1]

Judgment.—This matter is connected with a report against a certain mukhtar. It is said that he has changed sides in the course of different legal proceedings. In what is admitted to be the strongest case against him the charge is as follows: Certain persons were accused of an assault upon the servant of a zamindar. The mukhtar appeared on behalf of one or more of the accused persons in the appellate Court. Later on the zamindars brought proceedings under S. 145, Criminal P. C. The property, the subject-matter of this application by the zamindars, is said to have been the same property a dispute about which led to the alleged assault. It is therefore said that the mukhtar "changed sides" and was thereby guilty of unprofessional conduct. It must be borne in mind in

the first place that when the mukhtar first appeared it was merely to argue an appeal upon the evidence that was on the record.

The question in dispute in the proceedings under S. 145 would be as to who was in possession of the property. It does not necessarily follow that the mukhtar received any information from his first clients when he was appearing for them, which could be used, to their prejudice when he appeared for the zamindars in the proceedings under S. 145. There is nothing on the record to show that the mukhtar's first clients offered to employ him in the second case, or that they took any exception to his appearing in the case until the case was actually at hearing. Speaking generally it is quite clear that a professional gentleman should, as far as possible, stick to the side who first employed him. It might be a very good practice if when gentlemen were offered instructions in any connected case that they should at least in the first place inform their first client. In the present case it has not been proved to our satisfaction that the mukhtar has been guilty of any professional misconduct.

The rule is discharged.

V.B./R.K

Rule discharged

A I. R. 1915 Allahabad 376

RICHARDS, C. J. AND BANERJEE, J

Har Prasad—Defendant—Appellant.

V.

Mukund Lal—Respondent.

First Appeal No. 112 of 1915, Decided on 15th November 1915, from order of District Judge, Saharanpur.

U. P. Land Revenue Act (3 of 1901), Ss. 111 and 112—Order of Collector to bring suit on objection to quantum of share in partition, not carried out—Defendant relied on decision of civil Court in partition suit of non-revenue paying property—No appeal to District Judge on Collector's refusal to abide by it.

The applicant applied in the revenue Court against the defendant claiming partition. The defendant objected that the applicant's share was less than what he claimed. The Collector made an order under S. 111, Land Revenue Act, requiring the defendant to bring a suit in the civil Court within three months to determine the question. This was not done. After the expiry of three months, the case again came up before the Collector. The defendant alleged that the decision of the civil Court for partition in respect of the non-revenue paying property of the parties had settled the question. The defendant appealed to the District Judge:

Held: that no appeal lay to the District Judge. [P 377 C 1]

Nihal Chand—for Appellant.

Surendro Nath Sen—for Respondent.

Judgment.—This appeal arises under the following circumstances: Mukund Lal presented an application in the revenue Court against Har Prasad, alleging that he was entitled to three-fourths of the recorded property and claiming partition. Har Prasad filed an objection that Mukund Lal's share was only one-half and the other half belonged to him. This matter having come before the Collector he made an order under S. 111, Land Revenue Act, requiring Har Prasad to bring a suit in the civil Court within three months to determine the question. Har Prasad never brought any such suit. He alleges however that there was pending in the civil Court a suit for partition brought by Mukund Lal in respect of non-revenue paying property, and that it was decided in that suit that they constituted a joint Hindu family and were therefore on partition entitled to all the joint property half and half. After the expiry of three months, when the case again came before the Collector, it was found that Har Prasad had not complied with the order. He tried to make out that the finding of the civil Court had settled the question. The Collector made an order in which he stated that the civil Court's decision had nothing to do with the revenue-paying property. The Collector accordingly overruled the objection which had been filed by Har Prasad. Against this order Har Prasad filed an appeal in the District Judge's Court. The District Judge held that no appeal lay to him and returned the memorandum of appeal for presentation to the proper Court. S. 111, Revenue Act, provides that when an objection is made by a recorded co-sharer involving a question of proprietary title, one of three courses is open to the Collector: he may either decline to grant the application until the question be settled by a competent Court, or he may require any party to the case to institute a suit in the civil Court within three months to settle the question or he may proceed to inquire into the merits of the objection himself. Cl. (3) provides that if this last mentioned course is adopted the Collector is to follow the procedure laid down in the Code of Civil

Procedure for the trial of original suits, and in that case an appeal lies to the District Judge S. 112 : It is clear that no appeal lies to the District Judge when the Collector makes an order under Cl. (a) and Cl. (b), S. 111 (1). Cl. (2) provides that if the Collector requires a party to bring a suit within three months and he fails to comply with the requisition, the Collector must decide the question against him. It is contended on behalf of the appellant that he substantially complied with the order of the Collector directing him to institute a suit. We find that all he did was to put in a defence to the effect that the family was a joint family and that the suit should be dismissed on the ground that all the family property had not been included in the suit. It is stated (probably correctly) that the result of this defence was that Mukand Lal's suit for partition in the civil Court was dismissed. In our opinion what Har Prasad did was in no way a compliance with the order of the Collector directing Har Prasad to institute a suit in the civil Court within three months. Even if we assume that Har Prasad substantially complied with the order of the Collector and that the latter should have decided in favour of Har Prasad, the section does not provide for an appeal in such case to the District Judge. We think the Court below was right. We accordingly dismiss the appeal with costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1915 Allahabad 377**

TUDBALL, J.

Tulshi Ram—Applicant.

v.

Abrar Ahmad and others -- Opposite Party.

Criminal Reyn. No. 450 of 1915, Decided on 10th July 1915, from order of District Magistrate, Bijnora.

Criminal P. C. (5 of 1898), Chap. 12, Ss. 145 and 522 — Magistrate not competent to oust one person and place another in possession—This power is conferred by S. 522 when offence committed — District Magistrate's order refusing to carry out this order cannot be interfered in revision.

There is no provision in Chap. 12, Criminal P. C. which gives a First Class Magistrate power to oust one person and to place another person in possession. The only provision of the Code which entitles a Magistrate to dispossess a person of property and replace him by another person who is entitled is S. 522 of

the Code, and for the purpose of exercising powers therein granted it is necessary that there should have been a conviction of an offence. [P 377 C 2]

An order of a District Magistrate declining to carry out such an order passed by a First Class Magistrate is not open to revision.

[P 378 C 1]

Satyra Chandra Mukerji — for Applicant

S. M. Sulaiman for Opposite Party.

R. Malcomson—for the Crown.

Judgment—The applicant has come to this Court on revision in the following circumstances: There is a certain house which is in dispute between him and the opposite party and he applied to a Magistrate to take action under S. 145, Criminal P. C. On 5th December 1914, the Magistrate passed an order under S. 145 calling upon the parties concerned in the dispute to attend his Court and to put in written statements of their respective claims. The Magistrate proceeded to make his enquiry and he came to the conclusion that Tulshi Ram had been wrongfully dispossessed on 25th November 1914 by the opposite party. He accordingly treated him as having been in possession on the date of his order of 5th December 1914 acting under the first of the provisos of Cl. 4, S. 145. He thereupon passed an order under Cl. 6 of that section declaring Tulshi Ram to be entitled to possession of the house until evicted therefrom in due course of law and he forbade all disturbances of such possession until such eviction. So far the order of the Magistrate appears to have been good and well within his jurisdiction. He however added the following sentence: "The possession of the house in question will be given to Tulshi Ram through the police." This latter portion of his order is based upon no provision in the Code of Criminal Procedure of which I am aware. Chap. 12 nowhere gives a First Class Magistrate any such power as to oust one person and to place another person in possession. The only provision in the Code of Criminal Procedure which entitles a Magistrate to dispossess a person of property and replace him by another person who is entitled is S. 522 of the Code and for the purpose of exercising powers therein granted it is necessary that there should have been a conviction of an offence.

This latter portion therefore of the Magistrate's order that the possession of the house could be given to Tulshi Ram through the Police appears to be ultra vires completely. Tulshi Ram in good faith applied to the Magistrate to enforce this portion of the order. The Magistrate sent on the petition to the Superintendent of Police asking that it might be done and the Deputy Superintendent of Police might be deputed to see the order carried out. The Superintendent of Police referred the matter to the District Magistrate pointing out that the order should have come from the District Magistrate and expressing his readiness to maintain order and peace. He seems in his order of reference to have assumed that the dispossession was to be carried out by some Revenue Official. On this the District Magistrate passed an order which is the subject of revision that order being "I am not going to order actual possession to be given by the Police." In other words the District Magistrate who is the district head of the Police declined to carry out the order of the First Class Magistrate that the opposite party should be dispossessed by the Police.

It is against this order that Tulshi Ram has come to this Court in revision. In the circumstances of the case the order of the First Class Magistrate being as I have pointed out ultra vires the District Magistrate's order declining to allow the Police to be utilised for the purpose of carrying out an illegal order is in my opinion a very proper order indeed in which I would not interfere. It seems to me that it is an order which is not open to revision by this Court at all. It is curious that under S 145 of the Code the Magistrate is allowed to treat a person who has been wrongly and forcibly dispossessed as having been in actual possession on the date on which he passed his initial order under Cl. 1 of the section while the section provides no machinery under which or through which the Court may proceed to remove the wrong-doer from possession and put the other man in his place. As far as I can see the remedy for Tulshi Ram in the present case is to make a complaint in respect of his wrongful and forcible dispossession and to prosecute the other side and if the

Magistrate should convict, then it would be open to him to apply to the Magistrate to exercise the powers granted by S. 522 of the Code. It is quite clear that in proceeding under S. 145, as the law stands it is impossible for the Magistrate to forcibly turn out one person and place another in possession of the property. The application is dismissed.

V.B./R.K. *Application dismissed.*

A. I. R. 1915 Allahabad 378

RICHARDS, C. J. AND RAUFQUE, J.

Kundan Lal—Plaintiff—Appellant.

v.

Jagan Nath—Defendant—Respondent.

Second Appeal No. 1056 of 1914, Decided on 9th July 1915, from decision Addl Judge, Moradabad, D/- 15th April 1914.

Contract Act (9 of 1872), Ss. 60 and 61—In absence of appropriation payment must be applied to earliest debt.

Where there is no appropriation of payment either by debtor or creditor, the payment must be applied to the earliest debt due by the defendant to the plaintiff. [P 379 C 2, P 380 C 1]

Golul Prasad—for Appellant.

K. N. Kalju—for Respondent.

Judgment.—This appeal arises out of a suit upon foot of a simple money bond, dated 10th September 1910. The defendant pleaded payment. The Court of first instance decreed the plaintiff's claim. The lower appellate Court found that the defendant had made a payment by a cheque, that the plaintiff had not made any appropriation of the payment and that accordingly the payment should be credited to the earliest debt then due by the defendant to the plaintiff, which was the bond sued upon. The lower Court says that the way the accounts were kept between the plaintiff and the defendant was that on the one side all advances made by the plaintiff to the defendant were entered and on the other side all the payments that were made to the plaintiff by the defendant. He seems to have been prepared to hold that from the way the account was kept, the plaintiff must be deemed to have from time to time appropriated

the payments to the earliest debts. The case however was really decided on the assumption that there had been no appropriation by either party and it is on this basis that the case has been argued before us.

Section 60, Contract Act, is as follows:

"Where the debtor has omitted to intimate, and there are no other circumstances indicating, to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits."

Section 61 :

"Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately."

The learned Additional Judge considered that if there had been no appropriation by either the debtor or the creditor, the payment must be applied to the earliest debt which was the bond in suit.

It is contended on behalf of the appellant that a creditor can make his election as to the appropriation of the payments "up to the last moment," and he cites the case of *Seymour v. Pickett* (1) as showing that the appropriation can even be made when the plaintiff is being examined at the trial of the case. On the other hand the respondents contend that under the provisions of S. 61, Contract Act, where there is no appropriation made by the debtor when paying the money or the creditor when receiving it, the law itself appropriates the payment in the manner provided by S. 61. The learned vakil refers to *Clayton's case* (2). At p. 605 of the report the Master of the Rolls says :

"This state of the case has given rise to much discussion, as to the rules by which the application of indefinite payments is to be governed. Those rules we probably borrowed, in the first instance, from the civil law. The leading rule, with regard to the option given, in the first place to the debtor, and to the creditor in the second, we have taken literally

from thence. But, according to that law, the election was to be made at the time of payment, as well in the case of the creditor as in that of the debtor, "*in re presenti, hoc est statim atque solutum est :—caeterum, postea non permittitur.*" If neither applied the payment, the law made the appropriation according to certain rules of presumption, depending on the nature of the debts, or the priority in which they were incurred. And as it was the actual intention of the debtor that would, in the first instance, have governed ; so it was his presumable intention that was first resorted to as the rule by which application was to be determined. In the absence therefore of any express declaration by either, the inquiry was, what application would be most beneficial to the debtor. "The payment was, consequently, applied to the most burdensome debt, to one that carried interest, rather than to that which carried none,—to one secured by a penalty, rather than to that which rested on a simple stipulation—and, if the debts were equal, then to that which had been first contracted."

Clayton's case (2) was one in which there was a current account, and it was held that the payments must be appropriated to the debts earliest in date. *Clayton's case* (2) was discussed in *Seymour v. Pickett* (1) and also in the case of *Cory Brothers & Co v. The Owners of the Turkish Steamship "Mecca"* (3). At p. 293 of the report of the last mentioned case Lord Macnaghten says :

"In 1816 when *Clayton's case* (2) was decided, there seems to have been authority for saying that the creditor was bound to make his election at once according to the rule of the civil law, or at any rate, within a reasonable time whatever that expression in such a connection may be taken to mean."

It seems to us that what the Indian Legislature did by Ss. 59—61 Contract Act was to adopt the rule of civil law with certain modifications. Unless the meaning of S. 60 is that the debtor is to make his appropriation (if any) at the time of paying and the creditor to make his appropriation (if any) at the time of receiving the money, it is difficult to conceive what is the meaning of S. 61 or how it could be applied. We think that the view taken by the Court below was correct. If by reason of the manner in which the plaintiff kept the account, he is to be deemed to have appropriated the payment to the debt of earliest date, there is an end to the case. If, on the other hand, there was no appropriation by either debtor or

(1) [1905] 1 K. B. 715=74 L. J. K. B. 413=92 L. T. 519=21 T. J. R. 302.

(2) 1 Mer. 572=35 B. R. 781=15 R. R. 161.

(3) [1897] A. C. 286=66 L. J. P. C. 83=76 L. T. 579=45 W. R. 667.

creditor, the payment must be applied to the earliest debt due by the defendant to the plaintiff. This was the bond in suit. We dismiss the appeal with costs, including in this Court fees on the higher scale.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1915 Allahabad 380

PIGGOTT, J.

Sohan Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 807 of 1915, Decided on 12th November 1915, from order of Sess. Judge, Meerut

(a) Criminal P. C. (5 of 1898). Ss. 235, 236 and 239—Offences under Ss. 403 and 417, Penal Code, can be tried together if facts alleged constitute one transaction—Burden of proving one transaction is on prosecution.

Where an accused person is charged of having deceived a canal officer in obtaining certain papers from him and also of having misappropriated a certain sum of money, the prosecution is entitled to ask the Court to go into both the charges at a single trial, provided it takes upon itself the burden of proving that the facts alleged against the accused, are in fact so connected together as to form parts of the same transaction, or to be otherwise triable at a single trial under the provisions of Ss. 235 and 236, Criminal P. C. [P 381 C 1]

(b) Penal Code (45 of 1860), S. 403 — Meaning of misappropriation explained — Dishonesty is essential.

In connexion with S. 403, I. P. C., the verb "to appropriate" means setting apart for or assigning to a particular person or use and to "misappropriate" means to set apart for or assign to the wrong person or a wrong use, and this act must be done dishonestly. [P 381 C 2]

P. L. Banerji—*for Applicant.*

Assistant Govt. Advocate — for the Crown.

Judgment.—This is an application in revision by one Sohan Lal. The applicant was tried and convicted by a Magistrate on a composite charge purporting to be laid under Ss. 403 and 417, I. P. C., and received concurrent sentences of imprisonment. On appeal, the learned Sessions Judge has maintained the convictions as recorded, but has set aside the sentences of imprisonment and imposed in lieu thereof cumulative sentences of fine aggregating Rs. 250. The essential facts may be stated as follows: Sohan Lal was the servant of a landholder named Mt. Sarvi Begam. There had been disputes between this lady and another cosharer in her mahal, culminating in a partition which had finally been settled by the revenue Courts and

ordered to take effect from the month of July 1915. In order to avoid disputes between the parties in the interval before the partition was to take effect, the Collector had exercised his powers under S. 45, United Provinces Land Revenue Act 3 of 1901, and appointed the other cosharer, Mehar Chand, an additional lambardar for the mahal in which he and Mt. Sarvi Begam were both cosharers, and of which Mt. Sarvi Begam had hitherto been the sole lambardar. The Magistrate who tried this case in the first instance thoroughly appreciated this point, but the learned Sessions Judge seems to have been under some misapprehension concerning it. There could not be a separate lambardar for the mahal known as 'Mahal Bindraban,' this being the name of the mahal assigned to Mehar Chand on partition, because no such mahal had yet come into existence. The intention of the Collector, no doubt, was that Mehar Chand should exercise all the powers, perform all the duties and enjoy all the rights of a lambardar in respect of that portion of Mahal Sarvi Begam which had been assigned to him under the partition.

Under these circumstances, an employee of the Canal Department went to the village, bringing with him the jamabandis or statements of account, showing the arrears of canal dues requiring to be realized from cultivators belonging to Mahal Sarvi Begam. This work of realization is ordinarily performed by the lambardars, who are enabled, by the exercise of due diligence, to earn a small remuneration in the form of a percentage on the dues collected. In accordance with the Collector's order, the effect of which had been properly appreciated by the revenue authorities, two separate jamabandis or statements of account had been prepared, one for that portion of the mahal of which Sarvi Begam was lambardar, and another for that portion of the mahal of which Mehar Chand had been appointed additional lambardar. The official entrusted with the conveyances of these jamabandis handed them both over to Sohan Lal. The latter proceeded to make all the necessary collections for the entire mahal in the name of his mistress, Mt. Sarvi Begam. He paid the money so collected in at the tahsil, received the percentage due to the lambardar for collections made with due

diligence, and paid over the money so received to his mistress, Sarvi Begam. There is no suggestion that he made anything for himself out of the transaction. He has been convicted of having deceived the canal official and thereby obtained possession of the jamabandi which was intended for Mehar Chand, and he has been further convicted of having criminally misappropriated that portion of the canal dues which was paid to him on account of collections made in Mehar Chand's division of the mahal. It is contended before me that both convictions are bad in law, and that in any case, the trial is bad, as the two alleged offences were not part of the same transaction and should not have been tried together. With regard to the alleged misjoinder of charges, my opinion is that the prosecution was entitled to ask the Court to go into the whole matter at a single trial, provided it took upon itself the burden of proving that all the facts alleged against the accused, were in fact so connected together as to form parts of the same transaction, or to be otherwise triable at a single trial under the provisions of Ss. 235 and 236, Civil P. C. This involves the further condition that, if the prosecution failed to make this out, the joint trial would be defective in law.

In the view which I take of the facts of this case, I need not labour on this point further. It seems to me that practically the prosecution assumed the burden of proving that the obtaining of a jamabandi for Mehar Chand's division of the mahal, was deliberately done by the accused Sohan Lal, in order to enable him to collect dues appertaining to the said division of the mahal and to deprive Mehar Chand of the opportunity of earning the lambardar's remuneration in respect of such dues. I do not think that anything of the sort is made out by the evidence on the record. The Magistrate who tried the case was inclined to doubt the evidence of Muhammad Sadiq, the peon who handed over the jamabandis to Sohan Lal. The learned Sessions Judge sees no reason to disbelieve the witness; but obviously his evidence does not prove anything regarding Sohan Lal's intentions at the time when he accepted delivery of the two jamabandis. When it is sought to establish the offence of cheating on the basis, not of any false

representation with regard to past events or existing facts, but on the basis of a promise as to something to be done in the future, the prosecution is often faced with this difficulty, that it has to prove that the person making the promise had no intention at the time of performing it. Assuming Muhammad Sadiq's evidence to be true as it stands, it would not, in my opinion, be safe to infer from this evidence that Sohan Lal did not at the time intend to pass on one of the two jamabandis left with him, to Mehar Chand. As regards the charge of criminal misappropriation, I am not prepared to hold that there is on this record sufficient evidence of dishonest intention on the part of Sohan Lal to warrant his conviction. The question of the respective rights and duties of the original lambardar and the additional lambardar of Mahal Sarvi Begam is not in itself absolutely clear, and may well have seemed extremely doubtful to the persons principally concerned. Sohan Lal was, after all, a servant acting under the orders and in the interests of his mistress. I am not prepared to assume against him that he knew he was causing wrongful gain to his mistress, or wrongful loss to Mehar Chand, by collecting these canal dues and receiving the remuneration therefor. There is no question in the present case of dishonest conversion of money to his own use by the person accused. The charge is therefore based on the words "whoever dishonestly misappropriates" The verb "to appropriate" in this connexion means "setting apart for, or assigning to, a particular person or use;" and to misappropriate, no doubt means "to set apart for or assign to the wrong person or a wrong use" and this act must be done dishonestly. The evidence on the record does not satisfy me that when Sohan Lal handed over to his mistress the money, which was after all only the due payment for work which he had himself performed, he was acting dishonestly within the meaning of that word as used in the Indian Penal Code. I therefore accept this application, set aside the conviction and sentence in this case and acquit Sohan Lal of the offence charged. The fine, if paid, must be refunded.

V.B./R.K

Application accepted.

A. I. R. 1915 Allahabad 382

KNOX, J.

Partap Singh and another—Plaintiffs
—Appellants.

v.

Dhum Singh and another—Defendants
—Respondents.

Second Appeal No. 1283 of 1914, Decided on 8th July 1915, from decree of Dist. Judge, Saharanpur.

Easements Act (5 of 1882), S. 60—License coupled with transfer of interest is irrevocable.

A grant of a license coupled with a transfer of interest cannot be revoked. [P 383 C 1]

Nihal Chand—for Appellants.*S. A. Hardar*—for Respondents.

Judgment.—The plaintiffs are the appellants in this Court. They come to Court as zamindars of a village in Dehra Dun. They say that the defendant, Dhum Singh, is a tenant of a certain plot of land in that village, that the defendant, Dhum Singh, and his son, Balbir Singh, members of a joint Hindu family, have cut down a number of kokat trees which stood on the land belonging to the appellants. They prayed for a decree for Rs 50 on account of the price of trees cut down, Rs. 25 as actual and deterrent damages and for perpetual injunction restraining the defendants from interfering in any way in future with the jungle. The respondents plead that there is a custom whereby the tenants are authorized in this village to use the jungle of the zamindars. They say that they have all along cut wood from the said jungle for their own use and stored it. This cutting is confined to kokat trees which I understand to mean trees mainly used for firewood. Both the Courts have found the custom set up by the respondents not proved. Behind that finding in second appeal I cannot go. At the same time the question raised is a very big question and it may be doubted whether the decision about custom has been rightly arrived at, but as I said before I cannot go behind it in second appeal and I am bound by it so far as this case is concerned. Both the Courts have found it proved that the tenants in this village have been allowed by the predecessor-in-interest of the appellants to cut firewood free of charge in land belonging to the appellants, and out of this they have construed a license granted by the appellant's predecessors to the respondents to

go upon the land in possession of the then zamindars and to cut firewood free of charge. The lower appellate Court then went on to consider whether that license has been specifically revoked. It came to the conclusion that it had been specifically revoked when the present suit was brought. It accordingly decreed the claim for injunction, but dismissed the claim for damages.

The appellants come into this Court and take the plea that after the transfer from the predecessor of the present appellants, the action of the defendants in cutting firewood was unauthorized and they are liable to pay damages found due by the first Court. I do not quite understand why they took the first plea in their memorandum of appeal, viz., that under S. 62, Easements Act, the license granted by the former zamindar may be deemed to have been revoked when he sold his rights in the village to the plaintiffs. This plea has however been taken and I go on to consider it. It has been contended on the opposite side that the license in the present case is not a mere license, such as would be the case if the respondents had been granted permission merely to go upon the land of the zamindar. There was, the contention runs, a license coupled with a grant, license to go upon the land coupled with the grant to cut and take firewood from the land. In support of this contention I was referred to a passage in the Tagore Law Lectures of Mr. Peacock on the law relating to Easements in British India. Reference is there made to the case of *Thomas v. Sorrell* (1). Apparently the Court's library does not possess a copy of Vaughan, but the passage in question will also be found in the case of *Wood v. Leadbitter* (2) in which Vaughan, L. C. J., is reported as saying in the course of his judgment:

A dispensation or license properly passeth no interest, nor alter or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park to come into his house, are only actions which, without license, had been unlawful. But a license to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use,

(1) Vaughan 330=124 E. R. 1098.

(2) [145] 13 M. & W. 848=14 L. J. Ex. 161
=9 Jur. 147=67 R. R. 331.

are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants."

This case has been applied in *Prosonna Coommar Singha v. Ram Coommar Ghose* (3). Petheram, C. J., in that case held that the law in this matter (this was anterior to the passing of the Easement Act)

"is the same in this country as it is in England, there being so far as we can see no common law in this country on the subject and no statutory law either. The law in England is clearly laid down in the case of *Wood v. Lead-bitter* (2). The Courts have acted upon the law as there laid down ever since, and it has always been held to be good law and binding upon them. That case decided that the license to go upon another man's land unless coupled with a grant, was revocable at the will of the grantor, subject to the right of the other to damages if the license were revoked contrary to the terms of any express or implied grant."

I notice that in that case the very point taken in this case was also taken for the first time before the High Court.

Holding as I do that this is the law of the subject even after the passing of Act 5 of 1882, the case appears to me to come within S. 60, Act 5 of 1882. When the transfer was made, the transferee had no higher right than his transferor. The transferor was not in a position to revoke the grant or the license, because the latter was coupled with a transfer of property and such transfer is in force. I am all the better able to hold this, because as I said in the beginning of my judgment the contrary holding would be a matter of great importance in the Dun.

The result is that the appeal is dismissed. The decree of the lower appellate Court is set aside and the plaintiff's suit dismissed with costs in all Courts. Under the circumstances I do not think it necessary to take up the memorandum of objections. They fall and disappear with the result of the case.

V.B./R.K. *Appeal dismissed.*

(3) [1869] 16 Cal. 610.

A I. R 1915 Allahabad 383

RICHARDS, C. J. AND PIGGOTT, J.

Rajmangal Misir and others—Plaintiffs—Appellants.

v.

Mathura Dubain and another—Defendants—Respondents.

Second Appeal No. 888 of 1914, Decided on 1st July 1915, from decree of the Addl. Judge, Gorakhpur.

(a) Evidence Act (1 of 1872), S. 33—Evidence of deceased witness in ex parte proceedings when summons not proved to be served is not admissible in the suit when restored.

A witness was examined in a suit on a bond to prove its execution. The suit was decreed ex parte. At the instance of the defendant the decree was set aside and the case was restored to its original number. In the meantime the witness died. His statement was sought to be relied on to prove execution:

Held: that the fact of the service of process before the passing of the ex parte decree, not having been proved, the statement of the witness as to the execution of the document was not admissible in evidence under S. 33, Evidence Act. [P 384 C 2]

(b) Evidence Act (1 of 1872), S. 70—S 70 does not include admission of execution before registering officer.

The "admission" referred to in S. 70, Evidence Act, is an admission in the course of the very proceedings, for example, made in the pleadings or by a party himself in his examination. The admission of the execution of a document by the executant before the Sub-Registrar as contained in the certificate endorsed on the document is not sufficient proof of its execution when a suit is brought on it. [P 384 C 2]

Kailas Nath Katju for Iswar Saran—for Respondents.

Judgment.—This appeal arises out of a suit on foot of a mortgage, dated 3rd February 1888. The original amount secured was Rs. 251. The amount claimed for principal and interest is Rs. 1,384. There is no allegation of any payment upon foot of principal or interest from the time of the execution of the deed, and the suit was not instituted until 10th August 1909, that is to say, in or about twenty-one years after the alleged execution of the mortgage. Defendant 1 is the widow of the alleged original mortgagor, one Bandhu Duba. Defendant 2 is alleged to be a subsequent transferee at an auction sale held on foot of another mortgage alleged to be puiarne to the mortgage in suit. An ex parte decree was obtained on 30th November 1909. This ex parte decree was set aside on 21st January 1913 on the applications of Mt. Mathura, plaintiff 1, who satisfied the Court that she had not been served with the process. When the Court was granting the decree ex parte, a witness of the name of Baldeo was produced who stated that he was the sole surviving attesting witness to the mortgage and that he had seen the bond executed by Bandhu. He identified the signature of Bandhu and his own. The ex parte decree having been set aside, as already stated, the plaintiff was

called upon to prove his case as in a contested suit. Meanwhile Baldeo had died. A witness was produced who attempted to prove that the signature of Baldeo was in the handwriting 'of the latter. He was unable to say that he had ever seen Baldeo write or that he had ever received documents purporting to have been written by Baldeo in answer to documents written by him or that documents written by Baldeo had in the ordinary course of business been habitually submitted to him. In other words, he was unable to say that he was "acquainted" with the handwriting of Baldeo. Under these circumstances the Court of first instance held that the plaintiffs had failed to prove the mortgage sued upon and dismissed the suit. The lower appellate Court confirmed the decree of the Court of first instance.

In second appeal to this Court it has been contended that the evidence of Baldeo given at the time the ex parte decree was granted should have been admitted as evidence of the due execution of the document. S. 33, Evidence Act, provides, amongst other things, that the evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding, or at a later stage of the same judicial proceeding, the truth of the facts which it states when the witness is dead. It is under this section that the appellants contend that the evidence of Baldeo should have been admitted by the Courts below. There is however a proviso to the section that before the evidence of a deceased witness can be admitted, it must be shown that the adverse party in the first proceedings had the opportunity of cross-examination. So far as Mt. Mathura is concerned it is clear that she had no such opportunity, it having been found by the Court that she was never served with the process prior to the granting of the ex parte decree. It is contended that as defendant 2 did not apply to have the ex parte decree set aside, it must be taken that he had an opportunity of cross-examining the witness. The affidavit of the process server, made in the absence of defendant 2 when the suit was first instituted, is relied on. In our opinion this is not sufficient. If it was intended to use the statement of Baldeo as evidence against defendant 2

it would at least have been necessary to prove by the oral evidence of the witness who had served him with the process, or the fact of service. It was not sufficient to refer to the ordinary affidavit of service made by the process server. It is unnecessary to decide whether if the process-server had been produced, his evidence would have been sufficient to entitle the plaintiffs to put the evidence of Baldeo, but it seems to us clear that without the evidence of the process-server the evidence of Baldeo was not admissible against either of the defendants. There was no evidence of the execution or due attestation of the document sued upon.

It was next contended that the certificate of the Registrar endorsed upon the bond proves an admission by Bandhu that he executed the document, and reliance is placed upon S. 70, Evidence Act. This section provides that admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested. It seems to us that the admission referred to in this section is an admission in the course of the very proceedings, for example, made in the pleadings or by a party himself in his examination. The contention is that the certificate contains an admission by Bandhu and that under the provisions of S. 60, Cl. (2), the certificate of the Registrar is sufficient proof that Bandhu made the admission. In our opinion this contention goes much too far. The certificate endorsed by the registering officer upon a document which requires registration is evidence that all the provisions of the Registration Act have been duly performed.

It may be said that the plaintiffs have been somewhat unfortunate. They have themselves to blame in the first place, because they waited so long before instituting their present suit. But for the period of grace allowed by the recent Limitation Act the suit would have been barred by time. If the finding of the Court below was correct that the defendants or at least one of them was not duly served, this also was the fault of the plaintiffs. The appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 385

PIGGOTT, J.

Sheonandan and another—Applicants.
v.*Emperor*—Opposite Party.Criminal Revn. Petn. No. 700 of 1915,
Decided on 30th October 1915, from
order of Sess. Judge, Jaunpur.**Penal Code (45 of 1860), Ss. 380, 201 and 511—Accused stole forged promissory note from file of suit by entering inner verandah of house of official and on pursuit tore the note—Accused held guilty under S. 380 and also Ss. 201/511.**

The accused brought a civil suit in the Court of the Subordinate Judge of Monghyr on the basis of a forged promissory note. The file of the case was sent for and kept in the Court of the Additional Munsif of Jaunpur being required in connexion with a suit pending in that Court, and it somehow found its way to the house of an official of the Court. The accused got into the inner verandah of the house and removed the forged promissory note from the file. From that place, on being pursued, they tore it to pieces.

Held that they were guilty of an offence under S. 380 I P. C.

Held further, that they were also guilty under S. 201, 511 of the Penal Code. [P 387 C 1,2]

Hamilton—for Applicants.*Government Pleader*—for the Crown.

Judgment—The two appellants, Sheo Nandan and Babu Nandan, were committed for trial on charges alleging against both of them the commission of offences punishable under Ss. 380 and 201, I P. C. The charges were amended by the Sessions Judge, although under the circumstances, it does not seem to me that there is any clear reason why he should not have been content to proceed with the charges as originally framed, unless indeed, as I shall have occasion to remark presently, he was prepared to add a further charge against Sheo Nandan alone. However in the result both the accused were convicted on the charge under S. 380, I P. C., and sentenced to rigorous imprisonment for three years each. Babu Nandan alone was convicted on the charge under S. 201, I P. C., and sentenced to a further period of rigorous imprisonment for three years. The essential facts put forward by the prosecution in this case, may be stated thus: There was in the Court of the Subordinate Judge of Monghyr the record of a certain suit filed on the basis of a promissory note. That promissory note was forged and the accused Sheo Nandan who instituted the said suit, had been guilty in so doing of an offence punish-

able under S. 471, I. P. C., namely using as genuine a document which he knew to be a forged document, and possibly also of the substantive offence of forging the said document, punishable under S. 467, I P. C., inasmuch as the promissory note in question purported to be a valuable security. Under circumstances which need not be set forth in detail, the record in question was sent from the Court of the Subordinate Judge of Monghyr to Jaunpur, where it was eventually placed in the custody of the Additional Munsif of Jaunpur being required as an exhibit in connexion with a suit pending in that Court. On 3rd May 1915 the file received from Monghyr Court somehow found its way to a certain house in the city of Jaunpur which was jointly inhabited by two officials belonging to the Court of the Additional Munsif, namely, Babu Lal, suits clerk, and Sheo Dyal, decree-writer.

The accused Sheo Nandan and Babu Nandan are alleged to have gone to the said house, to have obtained access to the Monghyr file and to have removed from it two papers, namely the forged promissory note and the list of documents along with which the pro-note had been filed in the Monghyr Court. They ran away from the house with these two papers in their possession. Being pursued they endeavoured to destroy the same by tearing them. They were however captured, and the two papers were recovered. In the Sessions Court, the case was tried at length on the facts, the accused persons denying practically all the allegations against them and producing evidence in support of an alibi. The only admission of any consequence made by either of the accused, was that Sheo Nandan did finally admit the promissory note before the Court to be the one which he had produced in the Court of the Subordinate Judge at Monghyr in support of the claim made by him in that Court. On the evidence before him, the Sessions Judge came to the conclusion that both the accused had been guilty of theft of these two papers and had committed this offence in a building used as a human dwelling, namely, the house occupied by the witnesses Babu Lal and Sheo Dyal. He held on the strength of various reported decisions of this Court that Sheo Nandan, being proved by the evidence to have committed the offence of forgery or

of using as genuine a forged document in connexion with which the charge under S. 201, I. P. C., was framed, could not himself be tried or convicted of causing evidence to disappear under the provisions of the latter section. He held this offence to be proved against Babu Nandan, convicted him on the charge under S. 201, I. P. C., and sentenced him to a further period of rigorous imprisonment for three years.

In support of the appeal filed in this Court, I have not been asked to examine in full detail the evidence with regard to most of the questions of fact which were contested in the Court below. I accept the finding of the learned Sessions Judge that the alibi evidence produced by the accused in his Court is unworthy of credit. I hold it to be proved by overwhelming evidence that, on the date set forth in the charge, the accused Sheo Nandan and Babu Nandan were seen running away from the house already referred to with the witnesses Babu Lal and Sheo Dyal in pursuit of them. They were captured and the two papers set forth in the charge, namely the forged promissory note and the list of documents were recovered from the possession of one or other of them. With reference to the charge under S. 201, I. P. C., I have further examined the evidence on the strength of which the learned Sessions Judge has come to the conclusion that the offence of forgery, and therefore also the offence of using as genuine a forged document, had been committed in respect of the promissory note in question, and I concur in the finding arrived at by the Court below on this point. It remains for me however to consider a number of arguments which have been addressed to me with regard to the propriety of the convictions affirmed by the Court below, and with a view mainly to obtaining a substantial reduction of sentence by reducing the offence of which the appellants have been convicted either to one of simple theft under S. 379, I. P. C., or possibly to one of simple mischief under S. 426, I. P. C. In this connexion it has been necessary to examine with care the evidence given by the witnesses Babu Lal and Sheo Dyal. These men were in a difficult position, undoubtedly the record in question, namely the file of the suit received from the Monghyr Court ought not to have been in the place

where it was at the time referred to in the charge. Neither Babu Lal nor Sheo Dyal had any business to remove that record from the safe custody of the Court of the Additional Munsif, and one or the other of them was guilty of misconduct and liable to departmental punishment for having so removed it. It is not to be wondered at under the circumstances that each of these men endeavoured in his evidence to throw the blame upon the other, and that the statements of neither of them as to the precise circumstances under which that record came to be at their house, or I may add, to the precise circumstances under which the accused Sheo Nandan and Babu Nandan put in their appearance, can be accepted as reliable. After allowing all due weight to these considerations I am nevertheless fully satisfied that the offence of theft in respect of these two papers was committed by the appellants Sheo Nandan and Babu Nandan acting in concert, and was so committed that it is not material for the Court, in view of the provisions of S. 34, I. P. C., to determine with certainty which of the accused actually removed either or both of the documents. There is clear and satisfactory evidence, apart from the statements of Babu Lal and Sheo Dyal, that the two accused ran out of the house with the aforesaid witnesses in pursuit, that they were captured at no great distance of the said house and that the two papers which formed the subject-matter of the theft, were recovered from the possession of one or either of them in a damaged condition.

I therefore regard the evidence as proving that the papers in question had been taken from the possession of Babu Lal, or of Sheo Dyal, or of both of them, without the consent of either of them, and taking the circumstances of the case as a whole I have no doubt that they had been taken dishonestly. With regard to the applicability of S. 380, I. P. C., rather than S. 379, I. P. C., it does not appear to me that the cross-examination of the prosecution witnesses in the Court below was very specifically directed to the point which has been made before me in argument. So far as the evidence goes, it seems to me to show that the theft took place in a verandah of the house situated on the inner side of the main door, and ob-

viously forming part of a building used as a human dwelling within the meaning of S. 380, I. P. C. A further question has been raised as to whether theft of property from the person of the complainant would be liable to enhanced punishment provided by S. 380, I. P. C., merely because the complainant in question happened at the time to be in some building. As a matter of fact, in the great majority of cases, such a question would be otiose because if a Court felt any doubt about applying S. 380, I. P. C. it could feel no hesitation in convicting under S. 451, I. P. C. In the particular case now before me, I am content to say that, although the evidence of Babu Lal and Sheo Dyal, as to the precise circumstances under which the accused succeeded in effecting the removal of these papers, is conflicting and unreliable, it is certain on the evidence as a whole that the papers were removed from the file while the file was in the verandah of the house, and cannot reasonably be said to have been removed from the person of Babu Lal or of Sheo Dyal. I am satisfied therefore that the conviction under S. 380, I. P. C., was right and proper. With regard to the conviction of Babu Nandan under S. 201, I. P. C., a number of questions have been raised. I think the Court below in trying this charge was bound to come to a finding as to whether an offence under S. 467, or S. 471, I. P. C., had or had not been committed. As already stated, I concur in the finding which the learned Sessions Judge has arrived at on this point. It is however clear to me that no offence punishable under S. 201, I. P. C., was actually completed. The evidence the disappearance of which it was desired to cause, consisted of the two papers in respect of which the accused have been convicted of theft, and then the papers cannot be said to have disappeared within the meaning of S. 201, I. P. C. They were recovered in a damaged condition, but for evidential purposes, so far as concerns the alleged offences under Ss. 467 and 471, I. P. C., they are complete and fully available for the purposes of justice.

I should not be prepared to say that in this case there had been even a temporary disappearance setting aside the further question of law whether a temporary disappearance would be suffi-

cient to fulfil the requirements of the section. Babu Nandan therefore can only be convicted on this part of the case of having attempted to cause the disappearance of these papers, that is to say, of an offence punishable under Ss. 201 and 511, I. P. C., and I am satisfied that the maximum punishment which could be inflicted upon him under these sections, would be one of rigorous imprisonment for a period of one and a half years. The question whether Sheo Nandan could or should at this trial have been further charged with offences under Ss. 471 or 467, I. P. C., and of the legal effect of his not having been so charged or convicted, does not now arise; but I am satisfied that there had been misjoinder of persons or charges in the Court below so far as the trial actually went. The position is perhaps a little awkward, in view of the fact that Sheo Nandan could not be convicted of any offence under S. 201, I. P. C. while he was undoubtedly guilty of the offence under S. 380, I. P. C., jointly committed by himself and Babu Nandan in the course of the same transaction. At any rate there was nothing illegal about the joint trial as held. I shall have to interfere with the conviction and sentence in the case of Babu Nandan for the reasons already stated and taking all the circumstances of the case into consideration, I am prepared to say that a severer punishment than rigorous imprisonment for a total period of three years seems to be required against this man in the interests of justice. The result is that I dismiss the appeal of Sheo Nandan. In the case of Babu Nandan, I affirm the conviction and sentence under S. 380, I. P. C. On the other charge I direct that the conviction be altered to one under Ss. 201 and 511, I. P. C., and the sentence reduced to one of rigorous imprisonment for one year, and I further direct that this latter sentence shall run concurrently with the sentence of three years' rigorous imprisonment passed on the conviction under S. 380, I. P. C.

V.B./R.K

Convictions affirmed.

A. I. R. 1915 Allahabad 388 (1)

KNOX, J.

Durga Prasad and another — Accused — Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 177 of 1915, Decided on 3rd August 1915, from order of Dist. Magistrate, Banda.

Penal Code (45 of 1860), S. 196 — Persuading others to make statements is not offence under S. 195.

Where it appeared from the Police papers that the applicant, "got at" one Mt. Putia and persuaded her to make a statement to the effect that she had seen certain persons whom she mentioned by name in the act of committing dacoity on her premises and that they apparently persuaded other persons to the same effect,

Held: that this was not sufficient to convict the applicants for an offence under S. 195, I. P. C. 30 *All. 52, Ref* [P 388 C 1]

M. Malviya and R. Malviya—for Applicants.*Asst. Govt. Advocate*— for the Crown.

Judgment—The District Magistrate of Banda in this case appears to have seen police papers of some kind and then and there to have instituted a case under S. 195, I. P. C. against two persons, Durga Prasad and Mohiuddin. The utmost that appears from the record is that apparently in the eyes of the Police Durga Prasad and Mohiuddin "got at" one Mt. Putia, and persuaded her to make a statement to the effect that she had seen certain persons whom she mentions by name in the act of committing dacoity on her premises, that they apparently persuaded other persons to make statements to the same effect. Assuming for the moment that this is an accurate statement of what did take place, it would not still amount to an offence under S. 195, I. P. C. There was no giving of false evidence at that time before the learned District Magistrate. There was no fabricating of false evidence as defined in S. 192, I. P. C. The order for the prosecution of these persons was evidently hastily given without due consideration as to whether there was any basis for the charge. I laid down in *Emperor v. Tabarak Zaman Khan* (1) that in cases of this kind the safer and more proper course is undoubtedly to let the informant bring his witnesses to the Court, hear them out, and then pass an order, if the case is considered to be a

(1) [1908] 30 All. 52=4 A.L. J. 790=(1907) A. W. N. 288.

false one, to the effect that the informer be tried for having instituted a false case. That would have been the proper procedure. In the present case I need not go into the question whether the Magistrate who does not observe this procedure is acting without jurisdiction. I am satisfied that the learned Magistrate had before him no basis on which he could pass the order he did.

I therefore set aside that order in its entirety, Durga Prasad and Mohiuddin if on bail, the bail bonds will be discharged.

V.B./R.K.

*Order set aside.***A. I. R. 1915 Allahabad 388 (2)**

BANERJI AND RAFIQUE, J.J.

Allahabad Improvement Trust—Plaintiff—Appellant.

v.

Tikandra Jang Bahadur — Defendant — Respondent.

Second Appeal No. 506 of 1915, Decided on 2nd August 1915, from decision of Dist. Judge, Allahabad, D/- 22nd January 1915.

Contract Act (9 of 1872), S. 74—In terms of auction sale, indemnity for the loss on resale on vendee's default was not stipulated—Vendor held not entitled to it—Vendee liable only to advance agreed.

The defendant purchased a site from the plaintiff at an auction under the following conditions:

"Purchaser shall immediately after the sale pay into the Municipal Office a deposit of 10 per cent of the purchase money and shall sign an agreement and shall pay the residue of the purchase money to the vendors within a period of nine months from the date of the sale and on payment of the said amount the purchase shall be completed. If the purchaser fail to comply with any of these conditions his deposit shall be forfeited and the vendors shall be at liberty to re-sell the lot either by public auction or by private contract". The defendant made a deposit of Rs. 1 only at the time of the auction sale and failed to comply with the rest of the conditions:

Held: that the plaintiff was entitled to recover only 10 per cent of the purchase money which the purchaser was bound to deposit and not the loss which might accrue to the plaintiff on re-sale of the site. [P 389 C 1]

B. E. O'Connor—for Appellant.*Tej Bahadur Supru* — for Respondent.

Judgment.—The suit out of which this appeal has arisen was brought by the Allahabad Improvement Trust represented by the Municipal Board of Allahabad under the following circumstances. For the improvement of the town of Allahabad a road called the Hewett

Road was opened out and land was acquired under the Land Acquisition Act. Portions of the land so acquired not used for the road were sold by auction under certain conditions set forth in a document, which was signed by the Chairman of the Municipal Board and the person bidding at the auction sale. The defendant purchased a plot of land for Rs. 3,900. He made a deposit of Rs. 1 only and did not pay the balance of the price. The Municipal Board after issuing notice to the defendant re-sold the land. The amount realized at the re-sale was Rs. 875. The present suit was accordingly brought to recover the difference, namely Rs. 3,024, from the defendant. The Court of first instance decreed the suit. Upon appeal the learned District Judge modified the decree of that Court and passed a decree in the plaintiff's favour for the amount of the deposit which the defendant was bound to make under terms of the contract. In our opinion the whole case turns upon the true construction of the provisions of the instrument called

"the conditions of sale, which was the contract between the parties to which we have referred above. Cl. 4 of this document provides that each purchaser shall immediately after the sale pay into the Municipal Office, Allahabad, to the credit of the Allahabad Improvement Trust, a deposit of 10 per cent of his purchase money and shall sign an agreement in the form sub-joined, and shall pay the residue of the purchase money to the vendors within a period of nine months from the date of the sale and on payment of the said amount the purchase shall be completed."

Clause 8 provides that

"if any purchaser fail to comply with any of these conditions, his deposit shall be forfeited and the vendors shall be at liberty to re-sell the lot or lots sold to him either by public auction or by contract."

As we have stated above, the deposit required by R. 4, was not made nor was the residue of the purchase money paid within the term fixed. There was thus a failure to comply with the conditions laid down in the document, and the provisions of Cl. 8 could be enforced. As we understand that clause it gives the vendor the right to re-sell the lot, but the penalty which it provides is the forfeiture of the deposit which the purchaser was bound to make. The Municipal Board, upon the purchase being made by the defendant, was entitled to obtain from the defendant the deposit of 10 per cent of the purchase money. This

amount they were entitled to recover under Cl. 8 as soon as a breach of the conditions of the document was committed. They also acquired the right to re-sell the property, but under Cl. 8 the right of re-sale did not carry with it a right to recover damages sustained by reason of any deficiency arising in the amount of purchase money realized by re-sale. The parties must be bound by the contract which they entered into, and we have to consider what their intention was when Cl. 8 was inserted in the document. If it had been intended that upon failure to perform any of the conditions of sale, the vendee would be liable to pay damages arising upon re-sale, one would have expected that such a condition would find place in the document. The absence of such a condition leads to the inference that the only penalty incurred by the vendee is the forfeiture of the 10 per cent of the purchase money which he was bound to deposit. In this view the English cases and other authorities cited before us have no bearing on this case and need not be considered. In our opinion the decision of the lower appellate Court is right and this appeal must fail. We accordingly dismiss it with costs, including fees on the higher scale.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 389

RICHARDS, C. J. AND BANERJI, J.
Dasraj—Objector—Appellant

v.

Sagar Mal and another—Judgment-debtor and Decree-holders — Respondents.

First Appeal No. 113 of 1915, Decided on 4th August 1915, from order of Dist. Judge, Meerut

(a) Provincial Insolvency Act (3 of 1907), S. 37—Letting out by insolvent on reasonable rent is valid.

If an insolvent lets at a reasonable rent his occupancy holding, the transaction is valid and cannot be avoided under S. 37, Provincial Insolvency Act, 1907. [P 390 C 1]

(b) Provincial Insolvency Act (3 of 1907), S. 18—Duty of Court and receiver is to preserve insolvent's property of whatever value.

It is the duty of the receiver and the Court administering the estate of an insolvent to preserve, as far as possible the state of the insolvent for the benefit of the creditors. It is not desirable to give up any property that is of value. [P 390 C 2]

Mohan Lal Sandal and Girdhari Lal Agarwala—for Appellant.

Tej Bahadur Sapru—for Respondents.

Judgment.—This appeal arises out of an insolvency matter. One Sagar Mal was adjudicated an insolvent upon his own petition on 1st August 1914. His petition of insolvency was presented on 3rd May previously. A receiver was duly appointed who attached certain crops growing on an occupancy holding which belonged to the insolvent. Desraj objected and said that the crops were his, Sagar Mal having executed a lease in his favour on 16th April 1914. He lodged security with the receiver and had the crops released. He then made an application to have his money returned to him. Rao Girraj Singh, one of the creditors who had obtained a decree against Sagar Mal, challenged the validity of the lease, alleging that the lease was fictitious and that the value of the occupancy holding was far beyond the rent mentioned in the lease, which was the sum of Rs. 260 per annum. He further alleged that the insolvent was in actual possession and cultivated the land. The learned District Judge in a short judgment states as follows:

"Under S 37, Act 3 of 1907, this lease shall be deemed fraudulent and void and I now annul it. Desraj then has no locus standi. He has got the crops and his deposit of Rs. 330 is forfeited. I dismiss this objection with costs.

Later on the learned Judge says:

"The receiver will arrange to surrender the insolvent's occupancy rights and to vacate the holding. He should enter into negotiations with Rao Girraj Singh for this purpose. The Government demand must be secured and my official expenses."

It seems to us that the order of the District Judge was altogether wrong. In the first place S. 37 had no application whatsoever. This section deals entirely with transfers, payments, et cetera, made in favour of one creditor by an insolvent with a view of giving that particular creditor a preference over the other creditors (see marginal note to the section). If the insolvent in the present case had in truth made a lease in favour of Desraj at a reasonable rent, the transaction would have been a perfectly valid one. The receiver would step into the shoes of the insolvent and and become entitled to the rent reserved by the lease, which he would hold for the benefit of the creditors. Of course on the other hand if the Court came to

the conclusion that the lease was a mere blind, that it never was intended that any person except the insolvent should cultivate the land, then the crop which was attached still belonged to the estate of the insolvent and the receiver was entitled to it. It seems to us also that the learned District Judge made a great mistake when he directed the receiver to surrender the occupancy holding. According to the objection taken by Rao Girraj Singh, the occupancy holding was a very valuable holding. He goes so far as to say that it would let for Rs. 450 a year. It is very difficult to see how the creditors of the insolvent would profit by the surrender of this very valuable holding. It is the duty of the receiver and the Court when administering the estate of an insolvent to preserve such estate, as far as possible, for the benefit of the creditors. The last thing desirable would be to give up any property that was of value. We allow the appeal, set aside the order of the District Judge and remand the case to him with directions to readmit it under its original number in the file and to proceed to hear and determine the same according to law, having regard to what we have said above. Costs of both sides will be costs in the matter.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 390

TUDBALL, J.

Ewaz Ali and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 399 of 1915, Decided on 25th June 1915, from order of Addl. Sess. Judge, Muttra.

Penal Code (45 of 1860), Ss. 366 and 373—Girl voluntarily leaving her guardian, met and lived with accused—She was handed over to other, and thus changed several hands, until she was made over to be married—Held accused not guilty.

A chamar girl between the age 13 and 14 voluntarily left the house of her husband and parents, met *E* on a public road and stayed with him for a month. Afterwards *E* made over the girl to certain other persons who bored her nose and made her appear a Jat girl. Subsequently the girl passed several hands until she was made over to a person to be married with his brother.

Held, that *E* was neither guilty of the offence of taking or enticing the girl out of the keeping of her lawful guardian nor of the offence of selling the minor with the intent that she might be employed or used for the purpose of prostitution.

[P 392 C 1]

Lalit Mohan Banerji--for the Crown.

Judgment.—The five appellants have been convicted by the learned Session Judge on the following facts as found by the Court below. Mt. Jamni is a Chamar girl between the age of 13 or 14 years. She was married and she lived with her husband and his parents. For reasons best known to herself she ran away apparently more than once from her home, and on the present occasion she got clean away, and was making her way along the public road to Agra when she was met by the appellant, Ewaz Ali, who was a road chaulkidar. He stopped her and at first decided to take her to the police station. Subsequently however after questioning her he agreed to take her into his house and she stayed with him for about a month. At the end of that month he made her over to the three appellants, Hira Lal, Shankaria and Mt. Surja. Apparently these persons were well aware of the circumstances of the girl. They bored her nose and made her, as far as possible, appear to be a Jat female. They then passed her off as Mt. Surja's niece and made her over to Gaur Jat on payment of Rs. 80 to be married to Sukhdeo. The deception was subsequently discovered, the girl was returned to these three persons and the money demanded back. Apparently it was returned. The girl was then made over to the fifth appellant, Tota, who is related to Mt. Surja. Tota, kept the girl and then finally sold her for a sum of Rs. 70, representing her to be his niece. She was sold to Kallu and Samai Singh for the purpose of being married to the brother of Kallu, for whom a wife was being sought. While Kallu and Samai Singh were taking the girl away to Kallu's village, they were stopped by the Chaulkidar Sobha Ram and the whole matter was brought to light. Upon these facts the Court below convicted Ewaz Ali of an offence under S. 366, I. P. C. and sentenced him to six months' rigorous imprisonment and a fine of Rs. 40. Hira Lal, Tota, Mt. Surja and Shankaria have been convicted of cheating and have been sentenced, Hira Lal, Tota and Shankaria to one year's rigorous imprisonment each plus a fine, and Mt. Surja to six months' rigorous imprisonment. They have all appealed. No exception has been taken to the trial of all these persons together, at one and

at the same trial. In regard to Hira Lal, Tota, Mt. Surja and Shankaria, there can be very little doubt as to their guilt nor do the sentences imposed upon them call for interference. The case of Ewaz Ali is one of doubt. It is quite clear that when he met Mt. Jamni, the girl had got clean away out of the hands of her husband and his parents. The question is whether he can be said to have taken or enticed the girl out of the keeping of her lawful guardian. In the case of *Emperor v. Jetha Nathoo* (1), two Judges of the Bombay High Court pointed out the difference between the English Law on the subject and the Indian Law and the difference in meaning between the word "keeping" and the word "possession." One will have very little difficulty in fully agreeing with the decision in that case in view of the actual facts therein. There a girl under 16 years of age went out in search of work. She was induced by a deceitful promise of obtaining work to go to a certain house. There can be no doubt that in that case the offence of kidnapping was committed. In the present case the girl had voluntarily left the keeping of her guardian with the intention to remain out of that keeping and the accused Ewaz Ali, probably with full knowledge of the circumstances, gave her a home and finally transferred her to the keeping of Hira Lal, Shankaria and Mt. Surja on receipt of the sum of Rs. 40.

It is very difficult under these circumstances to say that he either took or enticed away the minor out of the keeping of the lawful guardian. The case is very much akin to that of *Emperor v. Ramchander* (2). In that case also a girl under 16 years of age left the guardianship of her husband and father-in-law of her own free will and not for the first time, and then subsequently stayed with the accused quite voluntarily and without any force having been exercised upon her. The Judges before whom that case came for decision held that the act did not amount to taking or enticing the girl out of the keeping of her lawful guardian. In the Judgment it was remarked as follows:—

"On the admitted facts the leaving and the removal out of the keeping of the lawful guardian

(1) [1904] 6 Bom. L. R. 785=1 Cr. L. J. 931.

(2) A. I. R. 1914 All. 376=23 I. C. 473=15 Cr. L. J. 265.

ardian was the act of the girl herself long before she met the accused".

In view of the above remarks in that case, seems to me that the conviction of Ewaz Ali under S. 363 can not possibly stand. The question arises whether Ewaz Ali could or could not be convicted of an offence under S. 372, that is selling a minor with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose. No doubt Ewaz Ali was well aware of what was about to happen to the girl. She was to be made to resemble as far as possible a Jat female, and to be used for the purpose of cheating other persons and obtaining money. That no doubt was unlawful, but for the purposes of the section the object must also be immoral. The point is covered by the decision of the Full Bench of this Court in *Empress of India v. Sri Lal* (3). There again a low caste girl, as in the present case, was falsely represented by certain persons as being a member of a higher caste, and another member of such higher caste was induced thereby to take her in marriage and to pay money for her in the full belief that such representation was true. It was held by the Full Bench that the accused could not be convicted on these facts of offences under Ss. 372 and 373, I P C. The decision covers the facts of the present case and I am bound to hold that Ewaz Ali committed no offence under S. 372 or 373, I P. C. It is clear that he did not attempt to cheat Hira Lal, Shankaria and Mt Surja.

Under these circumstances, I must allow the appeal of Ewaz Ali. I set aside his conviction and sentence and direct that he be forthwith released. The appeals of the other appellants are all dismissed.

V B./R.K.

Appeal dismissed.

(3 [1873-80] 2 All. 644.

A I R. 1915 Allahabad 392

CHAMBER AND PIGGOTT, JJ.

Jia Bibi—Applicant—Appellant.

v.

Ilahi Baksh and others—Respondents.

First Appeal No. 72 of 1915, Decided on 23rd June 1915, from order of Sub-Judge, Azamgarh.

Limitation Act (9 of 1908), Art. 164—Ex parte decree passed under old Act and execution applied under new—Application to set aside ex parte decree governed by Art. 164 of the new Act.

Where an ex parte decree was passed when the Limitation Act of 1877 was in force but an application to execute it was made after Act 9 of 1908 came into force:

Held: that an application to set aside the decree by the judgment-debtor would be governed by Act 9 of 1908. [P 393 C 1]

Pearry Lal Banerji—for Appellant.

S. M. Sulaiman—for Respondents.

Judgment.—This is an appeal against an order of the Subordinate Judge of Azamgarh, rejecting an application for setting aside a decree passed ex parte against the appellant in 1904. Her case was and is that she did not come to know of the decree in question until a proclamation of sale was brought to the village in December 1912, that is, less than 30 days before she presented her application. The evidence shows that the plaintiffs in the suit made repeated efforts to serve her personally with notice of the suit and of subsequent proceedings. Substituted service was effected and declared to be sufficient by the Court. She has herself sworn that she did not come to know of the decree against her until a few days before she made her application. Evidence has been produced on behalf of the respondents, which has been accepted by the Court below, that she was aware of the suit at the time when it was pending and was anxious to enter into a compromise. It is almost inconceivable that she should have remained ignorant of this suit, as she says, for eight or nine years. She says that she has been quarrelling with her son-in-law for the last 20 years. She must have other relatives who must have come to know of the suit, and we think there can be little doubt that she knew of the suit while it was pending. We accept the evidence which has been produced by the respondents to prove that she was aware of the suit. It is contended that the application should be governed in the matter of limitation, not by Art. 164, Lim. Act, which was in force at the time when the appellant made her application but by Art 164, Lim. Act, 1877, which provided that an application to set aside a judgment ex parte might be made within 30 days from the date of executing any process for enforcing the judgment. It is conceded that no such process was executed.

before the passing of the new Limitation Act. It has repeatedly held that in a case of this kind the law of Limitation to be applied is the law existing at the time when the application is made. It is sufficient to refer to the decision of the Bombay High Court in *Hope Mills Ltd. v. Vithaldas Pranjivandas* (1). There can be no doubt that the application is governed by the present Limitation Act and is barred thereby and was rightly dismissed both on the merits and also on the ground of limitation. This appeal fails and is dismissed with costs.

V B / R K. *Appeal dismissed.*

(1) [1910] 7 L. C. 982.

A. I. R. 1915 Allahabad 393 (1)

PIGGOTT, J.

Nirbhar Sinha and others—Defendants—Appellants.

v.

Tulsi Ram—Plaintiff—Respondent.

Second Appeal No. 1532 of 1914, Decided on 13th November 1915, from decision of Dist. Judge, Bareilly, D/- 2nd July 1911.

Limitation Act (9 of 1908), Arts. 116 and 109—Suit by usufructuary mortgagee for possession and mesne profits against mortgagor held to be for compensation for breach of contract—Art. 116 held applicable.

Where a usufructuary mortgagee sued for possession of the mortgaged property within six years of the date from which he was to have received possession and also claimed mesne profits for the same period on the allegation that the mortgagor had never given him possession in accordance with the terms of the deed, the mortgage deed being a registered one

Held that the claim for profits was in substance one for compensation for breach of a contract in writing registered and was governed by Art. 116 and not by Art. 109, Lim. Act (1888) A. W. N. 15 and 30 All. 400, *Ref* [P 393 C 2]

S. D. Sinha—for Appellants.

Sital Prasad Ghose—for Respondent.

Judgment.—This was a suit by a usufructuary mortgagee to recover possession on the allegation that the defendants mortgagors had never given him possession over the mortgaged property in accordance with the terms of the contract. The suit was brought within six years of the date from which the mortgagee was to have received possession. Profits were claimed for the entire period of six years. The only question discussed in the Courts below was as to the amount of the said profits. A point of limitation is raised in second appeal to this Court, it being contended that the suit was

governed, so far as the claim for profits was concerned, by Art. 109, Sch. 1, Lim. Act (Act 9 of 1908). The mortgage deed is registered and in, my opinion, the claim for profits was in substance one for compensation for breach of a contract in writing registered and subject to the period of limitation prescribed by Art. 116. I can find no authority to the contrary and the view which I have taken seems to have been assumed in the cases of *Balgobind Das v. Barkat Ali* (1) and *Collector of Mirzapur v. Daman Singh* (2). The only other plea taken in the memorandum of appeal, assails the finding of the lower appellate Court as to the amount of the annual profits which the plaintiff was entitled to recover. I think the appellants are up against a finding of fact on this point with which I cannot interfere. The appeal, therefore fails and I dismiss it with costs, including fees on the higher scale

V. B / R K. *Appeal dismissed.*

(1) [1888] A. W. N. 15.

(2) [1908] 30 All. 400 = (1908) A. W. N. 100 = 3 A. D. J. 486

A. I. R. 1915 Allahabad 393 (2)

TUDBALL, J.

Sheo Nandan Ahn—Defendant—Appellant

v.

Ram Lagan Singh and another—Plaintiffs—Respondents.

Second Appeal No. 1310 of 1914, Decided on 13th July 1915, from decree of Dist. Judge, Azamgarh.

Evidence Act (1 of 1872), S. 90—Mortgage bond 30 years old executed by scribe on behalf of executant—No presumption of authority to sign exists.

A mortgage deed more than 30 years old was signed not by the executant but by the scribe on behalf of the executant

Held: that under S. 90, Evidence Act, there was no presumption that the scribe had any authority from the mortgagor to sign his name on the document. [P 394 C 2]

Shamnath Mushran—for Appellant.

Narmadeshwar Prasad, Upadhyaya and Surendra Nath Sen—for Respondents.

Judgment.—This is a defendant's appeal and arises out of the following circumstances: The property in dispute is an occupancy holding. The appellant Sheonandan and one other brought a suit against the plaintiff in the revenue Court for arrears of rent. Sheonandan's case was that the holding had been mortgaged to certain mortgagees who had

sublet the land to Ram Lagan Singh, that the mortgage had been redeemed, that Ram Lagan Singh remained on as a subtenant and that he was liable for arrears of rent. Ram Lagan's case was that he was not a subtenant but that he held the land as a mortgagee in possession on an old mortgage of 1920 Sambit. The revenue Court went into the matter, held that Ram Lagan had failed to establish any mortgage and gave Sheonandan a decree for arrears of rent. Then Sheonandan and his companion brought another suit in the revenue Court to eject Ram Lagan Singh (and one other) as being a subtenant. The latter again put forward his plea that he held as a mortgagee under this old mortgage. The revenue Court referred Ram Lagan to the civil Court to obtain a declaration as to whether or not he held this land as a mortgagee. Thereupon Ram Lagan Singh and another plaintiff brought the present suit against Sheonandan Ahir, and claimed a declaration that the plaintiffs held the land as a mortgagee.

The Court of first instance dismissed the suit. The lower appellate Court decreed the suit. The defendant Sheonandan comes here on second appeal. Two points were pressed. The first is that the very point in dispute between the parties is *res judicata* by reason of the decision by the revenue Court in the rent suit. The second point is that the plaintiffs have failed to prove the mortgage which they put forward. I do not propose to touch the question of *res judicata* because in my opinion it is quite clear that the plaintiffs in the present suit have failed to establish any mortgage whatsoever in their favour. The mortgage deed set up by them is dated 1920 Sambit corresponding to February 1864. The document is unregistered. It is in the handwriting completely from beginning to end of one person. It purports to be in the handwriting of Gajadhar Das. The names of the executant and the names of the witnesses purport to have been written upon the document by the hand of Gajadhar Das. No portion of the document purports to have been written by the mortgagors. The alleged executants and the alleged attesting witnesses and the scribe are all said to have died. The plaintiffs produced the son of the scribe to testify to

the fact that the whole of the document is in the handwriting of his father. There is not a scrap of evidence to prove that Gajadhar Das had any authority from the alleged mortgagors or the alleged attesting witnesses to sign their names upon the document. The lower appellate Court in the course of its judgment remarks as follows:

"The scribe has signed for all the executants. It therefore appears that he was authorized by them to do so and the plaintiffs have proved the handwriting of the man who signed for the executants."

It is a mere assumption on the part of the lower appellate Court that the scribe appears to have been authorized by the alleged mortgagors to sign their names. The lower appellate Court also purported to apply S. 90, Evidence Act, and to presume the document to be genuine. Under S. 90 a Court may presume that the signature and every other part of a document which purports to be in the handwriting of any particular person is in that person's handwriting, and in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested. The present document does not purport to be executed by the mortgagors at all. It purports to have been executed by Gajadhar Das for the mortgagors. S. 90 does not allow a Court to presume that Gajadhar Das had any authority from the mortgagors to sign their names upon this document. The respondents' case is somewhat peculiar. If this mortgage-deed be a true one, then they and their predecessor in title must have held possession for at least 52 years, and one would have thought that it would be easy to prove their possession by means of the Government record. But apparently they have been unable to prove possession for anything more than 11 or 15 years and that only by the admission of the opposite party. The lower appellate Court in its judgment says:

"It has been produced from proper custody, and as I shall show later on, the plaintiffs-mortgagees have been in possession in accordance with this deed."

Later on what the lower appellate Court says about the plaintiffs' possession is as follows:

"The possession of the plaintiffs for at least 14 or 15 years has been admitted by the defendants. The oral evidence, coupled with the

mortgage deed, shows that the plaintiffs have been in possession as mortgagees."

It is impossible to hold that the plaintiffs-respondents held possession as mortgagees, unless and until it could be established that a mortgage was ever created. The document under which the plaintiffs claim as mortgagees no doubt exists and purports to have been written and the names of the executants to have been signed thereon by one Gajadhar. No authority from the mortgagers in favour of Gajadhar has been proved. Therefore it is impossible to say that this mortgage deed was executed by or with the consent of the alleged mortgagers. The mortgage not having been established it is impossible to give to the plaintiffs a decree declaring that they hold the land as mortgagees. In my opinion the decision of the Court of first instance was quite correct. I allow this appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance. The appellant will have his costs in all Courts-

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 395

CHAMIER, J.

Raj Bahadur—Defendant—Appellant.

v.

Shyam Lal—Plaintiff—Respondent.

Second Appeal No. 1441 of 1914, Decided on 30th July 1915, from decision of Dist. Judge, Farrukhabad, D/- 10th August 1914.

Civil P. C. (5 of 1908), O. 9, R. 9— Suit for profits dismissed in default—Subsequent suit for next three years including items for first three years recovered in years in suit— Claim not barred as cause of action is different — Agra Tenancy Act (2 of 1901), S. 164.

A cosharer brought a suit for profits of the years 1313, 1314, 1315 faslis against the lambardar. The suit was dismissed for default of appearance. Subsequently another suit was brought by the same cosharer for the profits of the year 1316, 1317, 1318 faslis. In this suit the plaintiff included also sums recovered during the years in suit in respect of the years 1313, 1314, 1315.

Held: that the suit was not barred by O. 9, R. 9, Civil P. C., inasmuch as the causes of actions of the two suits were different. [P 395 C 2]

Vishnu Nath—for Appellant.

Lakshmi Narayan—for Respondent.

Judgment.—The plaintiff in this case is a cosharer in a patti of which the defendant is lambardar. The plaintiff brought a suit against the defendant for the profits of the years 1313, 1314 and 1315 faslis. That suit was dismissed for default of appearance on the part of the plaintiff under O. 9, R. 8, Civil P. C. Some years later the plaintiff brought the present suit against the same person for profits of his share for the years 1316, 1317 and 1318 faslis and he has obtained a decree. Included in those profits are sums recovered during the years in suit in respect of the years 1313, 1314 and 1315 faslis. It is contended that the present suit is barred by O. 9, R. 9, Civil P. C., so far as the plaintiff seeks to recover any portion of the rents recovered on account of the years 1313, 1314 and 1315 faslis. In the Court below and here the defendant relied strongly on the fact that in the previous case the plaintiff claimed profits on the basis of the gross rental on the ground apparently that a large amount of profits had remained uncollected owing to the negligence or misconduct of the defendant. This fact does not appear to me to affect the question which I have to decide. O. 9, R. 9, Civil P. C., provides that where a suit is dismissed under O. 9, R. 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. The cause of action for the previous suit was made up of the plaintiff's title to the share and the profits thereof and the failure of the defendant to give him those profits at the end of each of the years 1313, 1314 and 1315 faslis. The plaintiff's cause of action for the present suit is made up of his title to the share and the profits thereof and failure of the defendant to give the plaintiffs those profits at the end of each of the years 1316, 1317 and 1318 faslis. The causes of action for the two suits appear to me to be totally different. The contention of the defendant in the present case seems to confuse two questions namely the question whether the two suits are based upon the same cause of action and the question whether the plaintiff is entitled in the present suit to sue for and recover any moneys which, if his suit had not been dismissed for default, he might have recovered in the previous suit if the Court had applied to the case

the provisions of S. 164, sub-S. 2, Tenancy Act. If as I hold, no portion of the present suit is barred by O. 9, R. 9, Civil P. C., the plaintiff is entitled to the decree which he has obtained from the lower appellate Court. I therefore dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 396

PIGGOTT, J.

Narain Das and others—Defendants—Appellants.

v.

Harakh Narain Tal and others—Plaintiffs—Respondents.

Second Appeal No. 1537 of 1914, Decided on 11th November 1915, from decision of Dist. Judge, Ghazipur, D/- 30th June 1914.

Provincial Small Cause Courts Act (9 of 1887), Sch. 2, Art. 31—Suit for money against defendant for appropriating entire fish from joint tank is of small cause nature—No second appeal lies.

Where the plaintiff brought a suit to recover a certain sum of money on the allegation that a particular tank was the joint property of the parties and that the defendant had caught fish from the said tank and appropriated the entire fish by selling them for his own benefit:

Held: that the suit was one of the nature cognizable by the Small Cause Court and that therefore no second appeal lay. [P 396 C 2]

Gokul Prosad—for Appellants.

Haribans Sahai—for Respondents.

Judgment.—A preliminary objection has been taken to this appeal, on the ground that the suit is one of the nature cognizable by a Court of Small Causes and could not properly be brought before this Court in second appeal. On behalf of the defendants-appellants reference is made to Art. 3, Sch. 2 to the Provincial Small Cause Courts Act (Act 9 of 1887). The question is whether the suit, as framed, was one for profits of immovable property belonging to the plaintiffs alleged to have been wrongfully received by the defendants. The case seems to me very much on the boundary line. It is almost covered by the ruling in *Rameshar Singh v. Durga Das* (1), but there remains a doubt to my mind whether the money claimed in the present case was al-

leged in the plaint to have been "wrongfully received" by the defendants. The plaintiffs' case was that the defendants caught and sold certain fish under such circumstances that the plaintiffs were entitled to a rateable share in the sale proceeds, which share the defendants withheld and wrongfully appropriated to themselves. I am not clear on the wording of the plaint that there was any allegation that the catching of the fish or selling of the same constituted any infringement of the plaintiffs' right. I incline therefore to the opinion that the objection is well founded and that, as a matter of law, no second appeal lay in this case. I have thought it expedient however to hear the appeal on the merits. The point raised by the appeal can only be determined by a careful examination of the pleadings in the Courts below.

The plaintiffs alleged that they were part-owners of a certain tank which had been divided on partition between themselves and other cosharers, including some of the defendants. The dispute was with regard to fishery rights. In the third paragraph of the plaint, it is alleged that the fish were ordinarily to be found in abundance in a portion of the tank situated in the share of the plaintiffs alone. Indeed it was alleged that "at the time of fishing"—by which I understand, immediately any attempt was made to net the tank—all fish therein always collected together in a deep pool mentioned in the first portion of the said paragraph, which the plaintiffs alleged to be situated in the portion of the tank belonging to themselves alone. Nevertheless the plaint goes on to state that whatever fish were captured out of this pool (presumably also any fish which might by some accident be captured in any other portion of the tank), were always disposed of for the benefit of all cosharers. It is expressly pleaded that those defendants who were co-sharers in the proprietary rights over the tank had received their shares in the price of the fish caught in the plaintiffs' portion of the tank. The cause of action put forward was that, during the year in suit, the defendants having colluded together fished the tank and appropriated whatever fish they caught selling the same for their own benefit and withholding the plaintiffs' share. There is certainly no allegation in the plaint that fish were

taken by the defendants from one part of the tank rather than from another. The case set up for the defendants seems to me clear enough. They agree with the plaintiffs that there was a deep pool in the tank in suit in which fish ordinarily collected and in which alone they could be captured in any quantity. This deep pool, they alleged, is situated in the portion of the tank allotted to them. They claim that this allotment entitles them to net this pool and appropriate any fish which they might find therein for their own benefit. Both expressly and by implication, they deny the plea of the plaintiffs that fish taken from the tank were dealt with for the benefit of all the cosharers in whatsoever part of the tank they might be captured. I do not say that the Court of first instance altogether misapprehended the point in issue; but it is clear that the attention of the learned Munsif was concentrated to a large extent on a question of fact which was only incidentally raised by the pleadings, namely, the question whether the deep pool, the existence of which both parties admitted, was situated in the portion of the tank allotted on partition to the plaintiffs or in the portion allotted to the defendants. In substance however the learned Munsif upheld the case set up by the defendants.

He held it proved that they had only caught fish in the portion of the tank allotted to them on partition and that they were entitled to appropriate to themselves any fish so caught. The plaintiffs went on appeal to the Court of the District Judge. In their memorandum of appeal to that Court, they again raised the issue of fact which had been decided against them, by contending that the evidence on the record proved that the defendants had caught fish in the portion of the tank allotted to the plaintiffs' share.

Nevertheless the fifth paragraph of their memorandum of appeal seems to me to raise clearly enough the plea upon which the plaint was originally based. The learned District Judge proceeded to state the question for determination in very general terms and I must confess to having found it somewhat difficult to follow portions of the argument on which he has based his decision. He points out that the case set up for the defendants might involve serious practical difficulties in the

event of each cosharer attempting simultaneously with others to capture fish in the particular portion of the tank allotted to him on partition. He repudiates the contention that the particular deep pool in which fish ordinarily collected can be regarded as the property of a particular cosharer, so as to give that co-sharer exclusive right to any fish which he might capture therein. In substance he seems to me to have affirmed the case set up by the plaintiffs, that any fish captured from the tank were dealt with as the property of all the co-sharers in whatever portion of the tank any particular fish might be captured. If this is a correct view of the judgment of the lower appellate Court, there is obviously no force in this appeal, which is based on the plea that there should have been a specific finding as to the portion of the tank in which, or from which, the defendants had captured the fish which formed the subject-matter of the suit. For these reasons I dismiss this appeal with costs.

V.B./R.K.

*Appeal dismissed.***A. I. R. 1915 Allahabad 397**

RICHARDS, C. J., AND RAFIQUE, J.
Ramratan Lal and others—Defendants
—Appellants.

v.

Bhuri Begam and another—Plaintiffs
—Respondents.

Second Appeal No. 1009 of 1914, Decided on 7th July 1915, from decree of Addl. Judge, Farrukhabad.

Decree—Setting aside—Fraud—Order ex parte under O. 34, R. 6, Civil P. C., cannot be set aside without proof of fraud—Omission even intentional to state prior attempt to get personal decree is not sufficient fraud—Civil P. C. (1908), O. 34, R. 6,

A person who after due notice allows an order for personal decree under S. 90, T. P. Act, to be made against him without opposition is in the same position as a person who had such order made against him after contest. He cannot maintain a suit to set aside such decree without proving positive fraud. [P 393 C 2]

A neglect to inform the Court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful cannot amount to "fraud" which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under S. 90, T. P. Act. [P 400 C 1]

Surenbra Nath Sen—for Appellants.

S. M. Sulaiman—for Respondents.

Richards, C. J.—This appeal arises out of a suit in which the plaintiff sought to

set aside a decree, which the defendants had obtained under S. 90, T. P. Act, on the allegation that the same was obtained by fraud. The material facts are practically undisputed. The defendants or their representatives brought a suit upon foot of a mortgage dated 5th October 1893 and obtained a decree. They had asked in that suit not only for a decree for sale of the mortgaged property but also for a personal decree. This latter part of their claim was disallowed. Some years afterwards the decree-holders applied to the Court for a decree under S. 90, T. P. Act. Notice of the application was duly served on all the judgment-debtors.

They did not appear and the Court granted the decree, but limited it to the assets of the deceased mortgagor. This is the decree which it is sought in the present suit to set aside. Later on in execution of this decree a house of the judgment debtors was attached. The male judgment-debtors objected that the house could not be sold on the ground that they were agriculturists. This objection was overruled. There was an appeal by the judgment debtors which was dismissed. Both the Courts below have granted the plaintiffs a decree, setting aside the decree obtained by the defendant under S. 90, T. P. Act. The judgment of the Court of first instance is a little misleading unless one reads it as a whole, when carefully considered it is clear that the defendants practised no fraud on the plaintiffs to the present suit in respect of the service of notice of the application for the decree under S. 90.

The plaintiffs are pardanashin ladies, and it is quite impossible for any litigant to serve process of the Court in any way which would violate the *pardha* of such ladies. When the Court of first instance says that these ladies knew nothing about the decree under S. 90 it does not mean that the defendants in the present suit were in any way responsible for their want of knowledge. The ladies were duly served with the notice, so also were the male members of the family. No objection was taken to the granting of the decree under S. 90 and no application was ever made to set it aside. The male members who were equally interested with the ladies in opposing the decree, evidently thought that there

would be no chance of success. We find however when the house was attached in execution of that decree, they opposed the sale on the ground that they were agriculturists.

We now come to the only fraud which is suggested in the present case. The fraud is that the defendants (who then occupied the position of decree-holders) did not inform the Court that when the preliminary decree was being granted on foot of the mortgage, they had asked for a personal decree and that this had been refused upon the ground that having regard to the date of the mortgage and the position of the judgment-debtors, a personal decree ought not to be granted. Two questions arise. First whether it is open to a party to challenge an order which has been made between the decree-holder on the one side and the judgment-debtor on the other, even where no fraud is alleged or proved. It seems to me impossible to contend that, where (in the absence of fraud) a matter has been decided in execution proceedings relating to the satisfaction of the decree it is open to the parties to re-open matters which have been so decided by an independent suit. This has been settled by numerous decisions of the various Courts in India and also by their Lordships of the Privy Council.

Some attempt has been made to distinguish between what is called an "*ex parte*" decree or order and a decree or order after contest. I do not think there is any just ground for such a distinction. Assuming a party to have been duly served with notice, if he neglects to come forward and avail himself of the opportunity of preventing a wrong order being made against him I cannot conceive upon what possible ground he should be placed in a better position than the party who comes forward and informs the Court (in the manner provided by law) of his rights and prevents (so far as he can) a wrong order being made. In my judgment the party who after due notice allows the decree or order to be made without opposition is in the same position as a person who had a decree or order made against him after contest.

The next question is as to the nature of the fraud which must be alleged and proved in order to entitle the plaintiffs to have the decree set aside. On this

part of the case Dr. Sulaiman admitted, as I think he was bound to admit, that he could not claim to have a decree under S. 90 to set aside on any ground of fraud which would not have been sufficient to have a decree in a suit set aside.

A large number of cases have been cited on each side. On the part of the appellant the following cases were relied upon: *Mahomed Golab v. Mahomed Sulliman* (1), *Nilmadhub Rai v. Naba Das* (2), *Moruful Huq v. Surendra Nath Roy* (3), *Marochin v. Pansuram* (4), *Janki Kuar v. Lachmi Narain* (5), and *Nandu Kumar Howladar v. Ram Jiban Howladar* (6).

In the case of *Mahomed Golab v. Mahomed Sulliman* (1), Petheram, C. J., quotes at p. 618 from the case of *Flower v. Lloyd* (7).

"Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very grave consideration indeed before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris, and at arms length, could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories, or a misleading production of documents, or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principle witness and subornation of perjury; and so the parties might go on alternately ad infinitum."

In the cases of *Nandu Kumar Howladar v. Ram Jiban Howladar* (6) Jenkins, C. J., quotes with approval Sir John Rolt, L. J., in the case of *Patch v. Ward* (8):

"The fraud must be actual, positive fraud, a meditated and intentional contrivance, to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance."

In an earlier part of the judgment the learned Chief Justice says:

"But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation. The fraud used in obtaining the decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated."

On the other side also a number of cases have been cited including a decision of their Lordships of the Privy Council in the case of *Raymohun Gossain v. Gourmohun Gossain* (9). That was a case in which a party having expressly agreed not to appeal, in contravention of his agreement presented an appeal and obtained a decree, which he afterwards sought to set up against the other side. It is quite clear that this case was decided entirely upon its own facts and circumstances. The general law as to what constitutes sufficient allegation and proof of fraud to justify the setting aside of a decree in a previous suit was not discussed.

Special reliance was placed on a ruling of the Calcutta High Court in the case of *Lakshmi Churan Shah v. Nu Ali* (10). This decision was cited with approval by another Bench of the Calcutta High Court in the case of *Kedar Nath Das v. Hemanta Kumari* (11). In this case a decree had been obtained against the plaintiff ex parte. The plaintiff succeeded in having the ex parte decree set aside but another ex parte decree was passed against him. The plaintiff then brought a suit to set aside that decree on the ground that the same had been obtained by means of false evidence. It would appear that the Court held that on the mere allegation that the decree was obtained by false evidence the plaintiff was entitled to reopen the litigation. If we assume that no just distinction can be drawn between a person against whom a decree has been obtained without contest after due notice and a person who has appeared after notice and has been defeated after making the best fight he can. It seems to me that the decision of the learned Judges in the case cited omits to consider the great danger pointed out by Thesiger, L. J., in the case of *Flower v.*

(1) [1894] 21 Cal 612

(2) [1908] 12 C. W. N. 28 Note.

(3) [1912] 15 I. C. 893.

(4) [1911] 10 I. C. 905.

(5) [1915] 30 I. C. 789

(6) A. I. R. 1914 Cal. 232=23 I. C. 337=41 Cal. 990.

(7) [1879] 10 Ch. D. 327=19 L. T. 613=27 W. R. 496.

(8) 3 Ch. A. 203=18 L. T. 134=16 W. R. 441.

(9) [1859-61] 8 M. I. A. 91=4 W. R. 47=1 Suth. 378=1 Sar. 723=19 E. R. 464 (P.C.).

(10) [1912] 38 Cal. 936=11 I. C. 626.

(11) A. I. R. 1965 Cal 69=22 I. C. 709.

Lloyd (7). As the result of the decree of the learned Judges if the plaintiff had succeeded in setting aside the decree on the ground that the evidence advanced by the plaintiff in that suit was false, what was there to prevent the defeated defendant instituting another suit to set aside that decree on exactly similar grounds? This decision does not appear to have met with universal approval of the Calcutta High Court see: *Moruful Haq v. Surendra Nath Roy* (3).

I would here like to point out that it is open to question whether a decree or order which has been obtained after due notice is very accurately described as "ex parte." It is hardly necessary to remark that an order obtained after notice is very different from an order obtained without notice.

In the present case it seems to me that the neglect to inform the Court of the fact that there had been a previous attempt at another stage of the litigation to get a personal decree, even assuming that the neglect was wilful, could not amount to "fraud" which would entitle the plaintiffs to set aside the decree which was obtained by the defendants under S 90, T. P. Act. The present suit is in reality an "appeal" against the decree of the Court long after limitation I would allow the appeal.

Rafique, J.—I find that the questions argued at the Bar do not arise in this case. The arguments have proceeded on the assumption that a personal decree under S. 90, Act 4 of 1882 was obtained by the defendant-appellant not against the plaintiffs respondents. On reference to the record I find that no personal decree was passed against them, but a decree against them was passed in their representative capacity against the estate of Intiaz Ali, deceased, one of the mortgagors. The contention for them challenging the decree as having been fraudulently obtained is based on the assumption of a personal decree and as no such decree was passed, their contention fails. I would therefore allow the appeal.

By the Court.—The order of the Court is that the appeal is allowed, the decrees of both the Courts below are set aside and the suit is dismissed with costs in all Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 400

BANERJI AND RAFIQUE, JJ.

Janki Kuar—Plaintiff—Appellant.

v.

Lachmi Narain and others—Defendants—Respondents.

Second Appeal No. 458 of 1914, Decided on 28th May 1915, from decision of Dist. Judge, Cawnpore.

Decree—Setting aside—Ground of "decree in contravention of pleadings" is barred by res judicata—Ground of perjured evidence is not tenable.

A suit brought to set aside a decree in a previous suit on the ground that the decree had been passed in contravention of the pleadings in that suit is barred by the principle of res judicata.

A suit to set aside a decree on the ground that the decree in the previous suit was obtained by perjured and false evidence, is not maintainable. 23 I. C. 337 and 15 I. C. 893, *Poll. Case Law Referred* and 29 *Mad.* 179, *not Appr.* [P 401 C 2]

Kailas Nath Katju—for Appellant.

S. M. Sulaiman—for Respondents.

Judgment—This appeal arises out of a suit brought by the plaintiff appellant for possession of two shops and the rooms on the upper storey of these shops and for a declaration that a decree, dated 4th June 1907, of the Court of the Additional Judge of Cawnpore is null and void and ineffectual. The property in question along with other property originally belonged to one Bulak Ram. He made an endowment of portions of his property and left the remainder to his two widows. The survivor of them made a gift in favour of one Bindeshri Prasad in 1903. The plaintiff is the successor-in-title of Bindeshri Prasad. In the year 1907 the defendants the trustees of the endowment brought a suit against Bindeshri Prasad to set aside the gift, on the ground that the property comprised in it was part of the endowed property and that the donor had no power to make the gift. That suit related to a residential house and apparently to two shops situated in front of the house together with the loft or bala khana on the shops. There was a dispute also in that suit in regard to the passage leading to the residential house. On 4th June 1907 the Additional Judge of Cawnpore made a decree in favour of the plaintiffs to that suit in respect of the two shops and the loft on the top of them and dismissed the remainder of the claim. Subsequently to this the present plaintiff obtained an assignment from the son of Bindeshri

Prasad and thus acquired title. He brought the suit out of which this appeal has arisen on two grounds. First, that the Court acted *ultra vires* in the former suit in deciding the question relating to the two shops, as there was no dispute in that suit in respect to them and secondly, that the decree in the former suit was procured by fraud. The Court of first instance dismissed the suit and its decree was affirmed by the lower appellate Court. The plaintiff has preferred this appeal and the contentions raised in the plaint have been reiterated in the appeal before us. The case has been argued ably on both sides and a large number of rulings, English and Indian have been cited.

As regards the first ground stated above we are of opinion that the plaintiff who stands in the shoes of Bindeshri Prasad who was a defendant to the former suit, cannot set up a higher right than Bindeshri himself could have done. There can be no doubt that Bindeshri could not have maintained a separate suit to set aside the decree on the ground that the decree passed was in contravention of the pleadings and was therefore erroneous. His remedy was an appeal and no appeal having been preferred the decree whether right or wrong, has become final between the parties and a fresh suit to set it aside on the ground that it was erroneously passed offends against the well-known rules of *res judicata*. As regards the second ground, S. 44, Evidence Act, provides that a decree obtained by fraud is not binding. It may also be taken as settled by authority that a separate suit may be brought to set aside a decree on the ground of fraud. The question is what is the nature of the fraud which the plaintiff must allege and establish in order to obtain relief? It is contended on behalf of the plaintiff-appellant, that a plaintiff can maintain his suit on the ground that the decree in the former suit was obtained by producing fabricated evidence and in support of this contention the ruling in the case of *Venkatappa Naik v. Subba Naik* (1) was mainly relied upon. Other rulings also were cited. In the case mentioned above the head note runs thus:

(1) [1906] 29 Mad. 179=16 M. L. J. 59.

"A suit will lie to set aside a judgment on the ground that it was obtained by fraud committed by the defendant upon the Court by committing deliberate perjury and by suppressing evidence. The law on this point is the same in India as in England."

The facts of that case are not fully stated in the judgment, but reliance is placed by the learned Judges on two English cases, namely, *Abouloff v. Oppenheimer* (2) and *Vadala v. Lowes* (3). We may mention that those were cases in which a suit was brought either to enforce or to set aside a foreign judgment and in both instances the ground upon which the judgment was sought to be set aside was the ground of fraud. As pointed out by Jenkins, C. J., in *Nanda Kumar Howladar v. Ram Jiban Howladar* (4), Sir John Rolt in *Patch v. Ward* (5) discussing what is meant by fraud when it is said that a decree may be impeached for fraud, said:

"The fraud must be actual, positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance."

Following these observations the learned Chief Justice remarked as follows:

"There is however no suggestion that the decree in the previous suit was fictitious or that the plaintiffs in this suit were prevented by any contrivance from placing before the Court in the former suit any materials relevant to the issue, nor has there been any subsequent discovery of evidence that goes to show fraud, or that the Court was misled in the former suit."

He held that an error of fact or an error of law committed in the previous suit would not entitle a party to have the decree in that suit set aside on that ground. The same view was held by the same Court in *Moruful Huq v. Surendra Nath Roy* (6). In that case the learned Judges differed from the decision of the Madras Court to which we have referred above, and held that a decree in a suit cannot be set aside in a subsequent action brought for that purpose on mere proof that the previous decree was obtained by perjured evidence. The learned Judges followed the case of

(2) [1832] 10 Q. B. D. 295=52 L. J. Q. B. 1=47 L. T. 325=31 W. R. 57.

(3) [1890] 25 Q. B. D. 310=63 L. T. 128=38 W. R. 594.

(4) A. I. R. 1914 Cal. 232=23 I. C. 337=41 Cal. 590.

(5) 3 Ch. A. 203=13 L. T. 134=16 W. R. 441.

(6) [1912] 15 I. C. 292.

Baker v. Wadsworth (7). We think that the weight of authority is in support of the view taken by the Calcutta High Court in the two cases mentioned above and we are of the same opinion. The reasoning of the learned Judges in both these cases commends itself to us. In the present suit the only fraud alleged is that stated in para 3 of the plaint, namely, that the defendants made alteration in the eleven shops and the stable appertaining to the thakurdwara in such a way that they converted two shops into one shop, and one shop into a staircase room, and that owing to this circumstance and to the false evidence which was adduced to prove it, the Court was misled into holding that the two shops now in dispute were part of the endowed property. The present suit therefore is a suit based on the ground that a decree in the previous suit had been obtained by perjured and false evidence. That in our opinion is not a sufficient ground which would justify a party, who or whose predecessor-in-title was a party to the previous suit, to bring a subsequent suit with the object of setting aside the decree in the former suit.

It was open to the defendants to prove by evidence that the allegations made and the evidence adduced on behalf of the plaintiffs were untrue. Agreeing as we do with the view taken by the Calcutta High Court in the cases mentioned above, we do not feel ourselves justified in following the decision of the Madras High Court referred to above and we deem it unnecessary to refer to the various other rulings cited at the hearing. The learned vakil for the appellant has very properly drawn our attention to the recent decision of the same Court in *Logadapattu Chinnayya v. Kotla Ramanna* (8), in which the view taken in that case does not appear to have been approved. It is true that in the present case the plaintiff was not allowed to adduce evidence in regard to what was alleged by him to be fraud, but this is immaterial as, in our opinion, the allegations in the plaint as to the nature of the alleged fraud would not justify a Court in setting aside a decree passed between the parties in a previous suit even if the allegations were establi-

shed. We agree with the conclusion of the Court below and dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 402

PIGGOTT, J.

Mathura Prasad—Defendant—Appellant.

v.

Karim Baksh and another—Plaintiffs—Respondents.

Second Appeal No. 1434 of 1914, Decided on 1st November 1915, from decree of Sub. Judge, Meerut.

Easements Act (5 of 1882), S. 18—Grove land used as burial ground held to be customary right in the nature of easement.

Where a particular grove land was used by the family of Mahomedan residents of a village as burial ground:

Held, that the right claimed by them was not an easement but a "customary right in the nature of an easement." [1915 404 C 1]

M. L. Agarwala and Benoy Kumar Mukerji—for Appellant.

Pearcy Lal Banerji—for Respondents.

Judgment.—The facts out of which this appeal arises, may be stated as follows:

The plaintiffs and the pro forma defendants are Mahomedan residents of a certain village. The defendant-appellant is a Hindu, a mahajan of the same village. The dispute relates to a certain plot of grove land therein situated.

The ancestors of the plaintiffs and of the pro forma defendants held this grove as tenants. They executed a series of deeds purporting to transfer whatever rights they possessed therein, to the defendant. A dispute having broken out between the parties, the present suit has been brought by the plaintiffs to enforce a right, alleged to exist in favour of the family of which the plaintiffs and the pro forma defendants are members, to bury their dead in the said grove.

The Court of first instance apparently found that such a right did exist in favour of the family to which the plaintiffs belong, but that this right extended only to a small portion of the grove in dispute. The learned Munif, however, proceeded to grant the plaintiffs a declaration which was so cautiously worded that it is difficult to conceive of what use it could have been to them; it is consequently not surprising that the defendant did not appeal against it. The plaintiffs appealed, and there was

(7) [1898] 67 L. J. Q. B. 301.

(8) [1913] 38 Mad. 203=19 I. C. 572

no cross-objection filed by the contesting defendant. It is only by reference to the judgment of the lower appellate Court that one can ascertain whether he sought to support the decree of the Court of first instance on any of the points which had been decided against him. It does not appear to me that he did so.

Issue 1 as framed by the learned Sub-Judge in appeal, was in these terms:

"Have the plaintiffs a right to bury their dead in the whole area of the disputed grove, or only in the particular portion of it specified in the lower Court's decree?"

The point has not been taken in second appeal that the frame of this issue begs the questions in dispute, or any of them, in favour of the plaintiffs. The learned Sub-Judge, in spite of the curious frame of the first Court's decree, apparently understood the learned Munsif to have found in favour of the plaintiffs that they had a right to bury their dead in a certain portion of the disputed area, and he considered only whether that right did or did not extend over the whole area in dispute. If exception had been taken to this in the memorandum of appeal, I should have felt strongly disposed to remit an issue for a further finding. As the case for the appellant was put to me in argument the notion that the lower appellate Court had assumed any point against him without deciding it, was expressly disclaimed. I was invited to consider that, in spite of the frame of the issue, the learned Sub-Judge had in fact decided both points, viz., that there existed in favour of the plaintiffs, a right to bury their dead in the land in dispute and, secondly, that this right extended over and applied to the whole of the disputed area.

Of the pleas taken in the memorandum of appeal before me, those embodied in paras 2, 3 and 4, may at once be rejected. In para. 4, a point of law is sought to be raised which was not taken in either of the Courts below, and I do not think it is a question which I should permit to be raised at this stage.

The contention put forward in para. 2 would seem to be that a right to use land for the burial of the dead can only exist to the extent of placing one dead

body on the top of another, i. e., to a specific area already occupied by corpses previously interred. This seems to me obviously unsustainable. Nor does the fact put forward in para. 3, that the greater portion of the plot in dispute has been kept under cultivation by the appellant, seems to me in itself any reason for interfering with the decree of the Court below. It is quite conceivable that the plaintiffs might have a right to bury a deceased member of their family on a particular spot even though the surface of the ground at that point might be under cultivation by the defendant so long as it was not required by the plaintiffs for purposes of burial. The main contention in support of this appeal is that embodied in para. 1 of the appellant's memorandum. As stated, the plea taken is that there cannot be any easement in law "for burying the dead in a case like this." I do not altogether understand what is meant by the words "in a case like this," but the argument as laid before me, is based on the provisions of the Easements Act 5 of 1882, and in so far as it rests upon that Act, it is unanswerable. The finding of the lower appellate Court is that there exists in favour of the plaintiffs, or more strictly speaking in favour of the family to which the plaintiffs and the pro forma defendants belong, a customary easement of burying their dead in the entire area of the disputed grove.

There certainly cannot be a "customary easement" within the meaning of the definition in S. 18, Act 5 of 1882, for the simple reason that the right set up is not within the definition of an easement in S. 4 of the same Act. It is not claimed by the plaintiffs, and has not been found in their favour in virtue of their ownership or occupation of any land other than the grove in dispute. There being no dominant heritage, there can be no easement at all within the meaning of Act 5 of 1882. What I really have to decide, is whether I ought on this ground to set aside the findings of the lower appellate Court, and either reverse the decree of the learned Sub-Judge or call for a fresh finding or whether, on the other hand, I can regard the finding in favour of the existence of a customary easement as a finding that there exists a customary right of the nature of an ease-

ment independently of the provisions of the Easements Act, such as is safeguarded by the saving provisions of S. 2 of the Act itself. That there can be a customary right of burial under circumstances which obviously exclude the application of the provisions of Act 5 of 1882, for the reason already noted, i.e., the absence of any dominant heritage, I take to be settled law, as is apparent from such decisions as that in *Mohidin v. Shivlingappa* (1), which rests in part upon a decision of this Court in *Kuar Sen v. Mamman* (2). There is no specific reference to the provisions of the Easements Act in the judgments of the Court below, and it seems more reasonable to suppose that the learned Sub-Judge used the expression "customary easement" loosely, instead of the words "customary right in the nature of an easement," than to assume that he was entirely ignorant of the provisions of the Easements Act. Accepting the finding of the lower appellate Court in this sense, it seems to me to be substantially a finding of fact, or at any rate to be one with which I ought not to interfere on any of the grounds put forward in this appeal. I am bound to say that I consider the case a somewhat unsatisfactory one. The pleadings of the parties have been loose throughout, and it does seem to me to be open to argument whether the Courts below have held the plaintiffs as strictly as they might have done to the case set up in their written pleadings. I must however, give effect to the conclusion at which I have arrived by dismissing this appeal with costs.

V.B/R.K. *Appeal dismissed.*

(1) [1899] 23 Bom. 666.

(2) [1895] 17 All. 87=(1895) A. W. N. 10.

A. I. R. 1915 Allahabad 404

TUDBALL AND RAFIQUE, JJ.

Abdul Hakim Khan and others—Defendants—Appellants.

v.

Karan Singh and another—Plaintiffs—Respondents.

First Appeal No. 9 of 1914, Decided on 15th July 1915, from decree of Addl. Sub-Judge, Aligarh.

Civil P. C. (5 of 1908), O. 2, R. 2—Deliberate omission to claim right relief bars subsequent suit on same cause of action.

Where the plaintiff knew perfectly well what relief he was entitled to and he deliberately omitted to claim the right relief, his subsequent suit in respect of the same cause of action for the right relief is barred by the provisions of O. 2, R. 2, Civil P. C. [P 405 O 2]

B. E. O'Connor and Iqbal Ahmad—for Appellants.

Peary Lal Baderji—for Respondents.

Judgment.—The facts which have given rise to this appeal are as follows: Rahim Ali Khan, one of the defendants-respondents, was the owner of 7½ biswas in the village Dastara. On 5th December 1902, he executed a sale-deed in respect of 6 biswas out of the 7½ biswas in lieu of Rs. 14,000 in favour of Abdul Hakim Khan and his three minor sons. Out of the consideration money the sum of Rs. 12,000 was left with the vendees for the discharge of two prior mortgages, namely, Rs. 6,000, were to be paid on account of a usufructuary mortgage to the credit of Har Bhajan Lal and others, mortgagees, and Rs. 2,924-5-0 were to be paid to one Lala Sant Lal for a simple mortgage. It was further agreed that any balance left over, after payment to the two prior mortgagees, will be repaid to the vendor; the payments to the two prior mortgagees were to be made at stated times which were mentioned in the sale-deed. The prior mortgagees were admittedly not paid on the date mentioned in the sale-deed. On 12th September 1912, Rahim Ali Khan executed a deed of assignment in favour of Karan Singh and Ahmad Ali Khan in respect of the money due from the vendees, that is, the balance of the purchase money and damages on account of non-payment of the prior mortgages on the dates mentioned in the sale deed. On 9th January 1913 Karan Singh and Ahmad Ali Khan, the assignees, instituted the suit out of which this appeal has arisen for the recovery of Rs. 9,000, the amount said to be due on account of damages and the balance of purchase money. The claim was brought against the vendees and against Rahim Ali Khan and others. The claim was resisted on various pleas, one of which was that it was barred by O. 2, R. 2, Civil P. C. The learned Subordinate Judge, in whose Court the suit was filed, decreed it in part. The vendees have preferred the present ap-

peal. They challenge the decree against them on the ground, among others, that the suit is not maintainable in view of the provisions of O. 2, R. 2, Civil P. C. The argument is based on the allegation that on 11th September 1905 Rahim Ali Khan brought a suit in the Court of the Subordinate Judge of Aligarh for the cancellation of the deed of 15th December 1902, against the appellants, on the allegation that the latter had failed to carry out their part of the contract by not paying the prior mortgagees and not paying him the balance of the purchase money. The said claim was dismissed on the ground that the remedy sought by Rahim Ali Khan was not open to him, as the non-payment of sale price or the non-fulfilment of some of the terms of the contract of sale did not entitle the vendor to ask for cancellation of the sale. It is contended on behalf of the appellants that the cause of action alleged in the suit of 11th September 1905, was the same as the cause of action stated in the present suit, namely, the breach of contract by the appellants. It was open to Rahim Ali Khan in the former suit to sue for damages and the return of the unpaid sale price and that his omission to do so bars the present suit under O. 2, R. 2, Civil P. C.

In support of this contention the learned counsel for the appellants relies on the wording of the said provisions of law and on the following cases: *Rangayya Goundin v. Nangappa Rao* (1), *Badri Bisal v. Mt. Lalta Koer* (2) and *Raja Bahadur Shiv Lal Moti Lal v. Rajee Vappa Pampanna* (3). For the respondents the reply is that the provisions of O. 2, R. 2, Civil P. C., do not apply to the present case inasmuch as the remedy sought by Rahim Ali Khan in his former suit was misconceived and could not be granted to him. It is said that where a plaintiff sues for a relief that he is not entitled to, a subsequent suit by him for the right relief on the same cause of action is not barred by O. 2, R. 2, Civil P. C. In support of his contention the learned counsel for the respondents has relied on the following cases: *Piari v. Khiali*

Ram (4), *Darbo v. Kesho Rai* (5), *Sarsuti v. Kunj Behari Lal* (6), *Mohan Lal v. Bilaso* (7), *Bandey Ali v. Gokul Misir* (8), *Mt. Prab Devi v. Harkishn Das* (9) and *Mt. Parmeshri v. Vasdeo* (10).

The strongest cases for the respondents are those reported in *Piari v. Khiali Ram* (4) and *Mt. Parmeshri v. Vasdeo* (10). If it be conceded that the proposition of law laid down in the said two cases is correct, it does not help the respondents in the present case, for it was laid down in those cases that where a plaintiff has asked for a wrong relief presumably under a misapprehension of what relief he is entitled to seek, his subsequent suit for the right relief is not barred. In the present case we find on reference to the plaint of the suit of 11th September 1905, that Rahim Ali Khan knew perfectly well that he was then entitled to claim both the damages and the balance of sale price. In fact he stated in para. 9 of his plaint that he was entitled to recover damages and the balance of unpaid price from the defendants of the suit as well as ask for the cancellation of the sale deed, but he was for the present asking merely for the cancellation of the sale and that he would subsequently sue in respect of the other reliefs. The cases relied upon by the learned counsel for the respondents do not go the length of saying that in a case like the present, where Rahim Ali Khan knew perfectly well what relief he was entitled to and he deliberately omitted to claim the right relief, his subsequent suit in respect of the same cause of action for the right relief does not stand barred by the provision of O. 2, R. 2. It is clear that Rahim Ali Khan was entitled to more than one relief on his own statement in the plaint of 1905. He deliberately chose to sue in respect of one and omitted to sue in respect of the others and he did not obtain the leave of the Court in respect of the reliefs which he had omitted. The present claim therefore stands clearly barred under O. 2, R. 2, as the cause of action in the two suits is exactly the same.

(4) [1881] 3 All. 857.

(5) [1878 80] 2 All. 336.

(6) [1883] 5 All. 345=(1883) A. W. N. 81.

(7) [1892] 14 All. 512=(1892) A. W. N. 80.

(8) [1912] 34 All. 172=13 L. C. 154.

(9) [1884] 43 P. R. 1884.

(10) [1885] 35 P. R. 1885.

(1) [1901] 24 Mad. 491=28 I. A. 221 (P. C.).

(2) [1907] 10 O. C. 44 (F. B.).

(3) [1909] 1 I. C. 319.

The appeal therefore prevails and we allow it. The decree of the lower Court is set aside and the claim of the plaintiffs is dismissed with costs in both Courts. The objections filed by the plaintiffs as regards the amount disallowed by the Court below are also dismissed with Costs.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 406

TUDBALL AND RAFIQUE, JJ.

Parsotam Das and another—Applicants—Appellants.

v.

E. V. David—Opposite Party—Respondent.

First Appeal No. 70 of 1915, Decided on 2nd July 1915, from order of Dist. Judge, Cawnpore

(a) Provincial Insolvency Act (3 of 1907), Ss. 31 and 34—Decree-holder is entitled to auction sale proceeds realized before adjudication.

P obtained a decree against *E*. In execution of the decree he attached certain property of *E* and put it to sale. After the realization of the sale proceeds, the judgment-debtor was declared insolvent.

Held, that *P* was entitled to recover his debt out of the sale proceeds. [P 407 C 2]

(b) Provincial Insolvency Act (3 of 1907), Ss. 31 and 34—Order before adjudication, that portion of sale proceeds would stand security for decree that may be passed, made decree-holder secured creditor.

B brought a suit against *E* and attached certain property of *E* before judgment. He obtained an ex parte decree against the defendant. The property so attached was sold in execution of another decree and certain sale proceeds were realized. In the meantime the Subordinate Judge had set aside the ex parte decree on the condition that a certain portion of the sale proceeds would stand security for any decree that might be passed in the suit in favour of *B*. Subsequently the judgment-debtor was declared insolvent. Ultimately a decree was passed in favour of *B*.

Held: that *B* was a secured creditor and he was entitled to draw out the money which stood security for his claim against *E*. [P 408 C 1]

Kailas Nath Katju—for Appellant.

A. P. Dube—for Respondent.

Judgment.—These two appeals, Nos. 70 and 71 of 1915, arise out of the same insolvency proceedings. The facts are simple. One George Edwards had been adjudicated an insolvent on 5th January 1915 by the District Judge of Cawnpore on an application made by him himself on 16th November 1914. Parsotam Das, one of the appellants before us, claims to be a person whose circumstances fall within the terms of S. 34, Provincial

Insolvency Act, and demands a right to certain money realized in execution of his decree against the insolvent by sale before the date of the order of adjudication. Beharilal, the other appellant, is a person who claims to be a secured creditor within the meaning of S. 31 of the Act in respect of the sum of Rs. 1,100. It appears that some two or three decrees had been obtained in the Court of the Munsif of Cawnpore against the insolvent early in the year 1914. Among these was that of Parsotam Das, the appellant, who obtained his decree on 14th January of that year.

He applied for attachment and sale of certain property in execution of his decree in the Court of the Munsif. There were other decrees obtained against the insolvent in the Court of Small Causes, but we are not concerned with them. In June 1914, Beharilal brought a suit in the Court of the Additional Subordinate Judge against the insolvent and he applied for attachment before judgment of part of the property which Parsotam Das had already attached in execution of his decree. The Court ordered attachment as prayed and then on 15th July 1914, it gave a decree ex parte against the insolvent in favour of Beharilal. Beharilal then applied in the Court of the Subordinate Judge for execution of his decree. This was on 24th July 1914. He also applied to the Subordinate Judge pointing out that the property of the judgment-debtor had been attached in execution of the decrees in the Munsif's Court, and he asked the Subordinate Judge to take action under, S. 63, Civil P. C.

It appears that all the decree-holders and certainly Beharilal, in order to save time and trouble, agreed that the Munsif should carry on the execution of the decrees of his Court, more especially the decree of Parsotam Das, that he should sell the property and remit the assets so obtained to the Subordinate Judge so as to enable the latter Court to distribute the sale proceeds rateably among the decree-holders. Accordingly the property was actually sold in execution of the decree of Parsotam Das by the Munsif, and the sum of Rs. 3,961 was transferred on 19th August 1914 to the Court of the Subordinate Judge, to which all the other decrees were also transferred for satisfaction. On 4th August 1914, the

judgment-debtor applied, in the suit brought by Beharilal, to have the *ex parte* decree set aside. Notice was issued, and on 24th October 1914, an order was passed in favour of the judgment-debtor, setting aside the *ex parte* decree and granting a rehearing of the suit. Up to that time the sale proceeds, Rs. 3,961, had not been rateably distributed among the various decree-holders. It was stated in the Court of the Subordinate Judge that the amount which would approximately fall to the share of Beharilal's decree out of the sum of Rs. 3,961, which was in Court, would be Rs. 1,100.

Thereupon the Court passed an order on 24th October 1914, as mentioned above, setting aside the *ex parte* decree. The grounds given in the order were, that the application was supported by an affidavit; that the sum of Rs. 1,100 was stated to be the approximate amount out of Rs. 3,961 which on rateable distribution would fall to the lot of Beharilal, and as that sum was in Court as security and it was only deficient to the extent of Rs. 300 as compared with the claim of Beharilal, therefore the application for rehearing was granted. On 11th November 1914 the Court passed another order on an application of Beharilal, which clearly shows the meaning of its order passed on 24th October 1914. In this order it distinctly states that the sum of Rs. 1,100 was security, and should remain as such security until the decision of the suit. We again note here that on 27th October 1914, Parsotam Das applied to the Munsif to have the sum which had been recovered by sale distributed among the other judgment creditors other than Beharilal. The Munsif sent on the application to the Subordinate Judge, who stated that he would distribute the money himself and keep all the execution cases pending in his Court. On 17th November, the day after the application for insolvency had been made, the District Judge sent an order to the Subordinate Judge directing him to stay his hand and not to distribute Rs. 3,961 among the creditors whose decrees were in process of execution. On 17th December 1914, Beharilal's suit was again decreed on a compromise, and on that very same date he applied for payment of Rs. 1,100 which was deposited in Court. The Subordinate Judge sent on this application to the District Judge,

who directed the Subordinate Judge not to pay the money.

These are the circumstances of the case, and the two points for decision are, first of all, whether the amount which Parsotam Das claims as payable to him himself is liable to distribution among the creditors or is money which falls within the meaning of S. 34, Insolvency Act. The second point is, whether Beharilal is or is not a secured creditor within the meaning of S. 31 in respect of Rs. 1,100 mentioned above. The learned District Judge appears to have held that the sale of the property by the Munsif was not a sale legally held in execution of Parsotam Das's decree. He points out that under S. 63 Civil P. C., it was only the Subordinate Judge who ought to have put these decrees into execution, and that therefore in his opinion the sale by the Munsif was either an invalid sale or was a sale carried out by the Additional Subordinate Judge himself through the Munsif. The actual fact is as we have already pointed out. The Munsif with the consent of all the decree-holders sold the property which had been attached in execution of Parsotam Das's decree, and the assets were realized in the execution of that decree. They were in deposit in Court. That sale clearly was neither illegal nor invalid. All the parties agreed to it, and moreover Cl. 2, S. 63, clearly shows that there was nothing invalid in that sale. The simple fact therefore remains that after the execution of Parsotam Das's decree against the property of the judgment debtor, assets had been realized by sale of the property before the date of the order of adjudication. The learned District Judge's order therefore in respect of Parsotam Das is clearly wrong and must be set aside, and we hold that Parsotam Das, when he proves his debt, is entitled to recover that debt out of Rs. 3,961 which had been realized by sale in execution of his decree.

The case in regard to Beharilal is a little different. The contention on his behalf is that the sum of Rs. 1,100 was directed by the Court of the Subordinate Judge to be held as security for any sum which might be finally decreed to him, and when the case was decided and a decree was finally passed, that money, which was in deposit and stood as security, became the money of Beharilal

himself and he was entitled to recover it at once by application, such as he made on 17th December 1914. On behalf of the receiver it is maintained that this sum was never ordered to be a security as pleaded by Beharilal. The decision of the question depends on the meaning of the order passed by the Subordinate Judge on 24th October 1914; that is, the order which was passed on the application of the judgment-debtor to have the ex parte decree set aside. We have already noted that order. In view of its language and in view of the language of the order of 11th November 1914, we have not the slightest doubt that the learned Subordinate Judge intended that the sum of Rs. 1,100 was to remain as security, in part at least, for whatsoever might be decreed to Beharilal on the rehearing of the case. Such an order was a valid order, which the Court was clearly entitled to pass at the time of granting the rehearing of the case under O. 9, R. 13. Money which is deposited as security in obedience to an order passed by a Court under O. 9, R. 13, is similar to money which is deposited under the rules of the Supreme Court in England under O. 14 on an application for leave to defend. In the case of *In re Ford, Ex parte the Trustee* (1), it was held that money of this description must be treated as money paid in to abide the event and is a security to the plaintiff for the sum for which he may obtain judgment at the trial. In the judgment in that case it is laid down as follows:

"The order must be treated as an order that the right to the money when paid into Court shall abide the event see *Bird v. Bastow* (2), where the order appears to us to have been in the same form as in this case; and it is settled that where money is ordered to be paid into Court to abide the event it must be treated as a security that the plaintiff shall not lose the benefit of the decision of the Court in his favour."

It seems to us quite clear that when a decree was passed in favour of Beharilal, the sum of Rs. 1,100 which stood as security was his, and he was entitled to draw it out from Court and appropriate it to his own use. The application of 17th December 1914 ought to have been granted. It is suggested that the District

Judge's order might be treated as an order passed by him under S. 13, Cl. 3, Insolvency Act. In the first place, it was clearly not an order for attachment at all and in the second place, the money was not under the control of the debtor. We think there is no doubt that Beharilal was a secured creditor in respect of the sum of Rs. 1,100 mentioned above.

We therefore set aside the order of the District Judge. We declare Beharilal a secured creditor to the extent of Rs. 1,100 and that he is entitled to recover that sum as against the receiver. Each of the appellants will recover their costs as against the receiver out of the estate of the insolvent.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 408

KNOX AND RAFIQUE, JJ.

Sakhawat Ali Shah—Defendant—Appellant.

v

Muhammad Abdul Karim Khan—Plaintiff—Respondent.

Second Appeal No. 962 of 1914, Decided on 4th November 1915, from decision of Addl. Judge, Aligarh, D/- 1st April 1914.

Civil P. C. (1908), O. 21, R. 66—Sale notification determines what passes by sale.

Where an inventory of the property to be sold filed by a decree-holder with his application for execution, showed that only a zamindari was to be sold and not a building situated therein:

Held that the sale did not pass the interest of the judgment-debtor in the building: 4 All 381 and 22 All. 168, *Dist.* [P 409 C 2]

(Per Knox, J.)—The sale notification is a most important document when Court wishes to find out what was sold in an auction sale held in execution of a decree. [P 409 C 2]

Shafiuzzaman—for Appellant.

Tej Bahadur Sapru—for Respondent.

Rafique, J.—The dispute between the parties to this appeal is between two rival purchasers at auction sales. It appears that several persons obtained decrees against one Syed Haider Shah who was one of the zamindars of the village Khanpur. In execution of the decree of one Lachhmi Narain, the zamindari share of Syed Haider Shah was sold and purchased by the plaintiff-respondent. In execution of another decree obtained by one Lakhmi Mal against the same Haider Shah, the property called the

(1) [1900] 2 Q. B. 211=69 L. J. Q. B. 690=48 W. R. 868=82 L. T. 625=16 T. J. R. 399=7 Manson 281.

(2) [1892] 1 Q. B. 94=61 L. J. Q. B. 1=65 L. T. 656=40 W. R. 71=56 J. P. 196.

kila situate in Khanpur was sold and purchased by the defendant-appellant. The plaintiff-respondent objected to the attachment and sale of the said kila in execution of the decree of Lakhi Mal, but his objection was disallowed. He then brought the suit out of which this appeal has arisen for a declaration that the plaintiff-respondent, by virtue of his purchase at auction sale, is the owner of the share of Haider Shah in the kila situate in Khanpur. The defendant-appellant resisted the claim on the ground that all that the plaintiff-respondent had purchased at the auction sale was the zamindari share of Haider Shah. The objection of the appellant was disallowed by the lower Courts and the claim decreed.

In appeal the defendant repeats his plea and contends that all that was sold to and purchased by the plaintiff-respondent at the auction sale of 21st March 1910 was the zamindari share of Haider Shah in Khanpur and that his interest in the kila was expressly excluded from the sale. The Courts below have relied upon the ruling of *Abu Hasan v. Ramzan Ali* (1) The facts of that case were that the rights and interest of a zamindar in a certain zamindari village were sold in execution of a decree. At the time of the sale, a certain building stood on the property of the judgment debtor, i. e., in the village that was sold. The question was whether the sale of the zamindari included the sale of the building also. It was held that in the absence of evidence showing that the building was excluded from the sale, the sale of the rights and interest in the zamindari included the sale of the building also. The principle of the case of *Abu Hasan v. Ramzan Ali* (1) cannot be applied to the present case, for the reason that there is evidence upon the record to show that the sale of the rights and interest of Haider Shah in Khanpur did not include his interest in the kila. The inventory of the property to be sold, filed by Lachhmi Narayan with his application for execution of decree, mentioned nine lots of property, the first of which was the zamindari share of Haider Shah and the ninth the kila situate in Khanpur. It was in accordance with this application of the decree-holder that the zamindari share of Haider Shah was brought to

sale. The order of attachment and the order of dakhaldihani were drawn up in accordance with the inventory filed by the decree-holder, vide papers Nos. 18C, 17D, 131, 141, and 153. These documents show that the sale of 21st March 1910, did not pass the interest of Haider Shah in the kila to the plaintiff-respondent. I would therefore allow the appeal.

Knox, J.—I fully agree with my learned brother. Neither the precedent of *Abu Hasan v. Ramzan Ali* (1), nor that of *Banke Lal v. Jagat Narain* (2) are safe guides in the present case. In the properties which were put to sale, the zamindari share without any specification was sold in the former and in the latter the sale notification distinctly described the property sold as being 20 biswas with gardens belonging to Ram Sarup and Piare Lal. The respondent cannot show in this case the sale notification. This is unfortunate, and as it was one of the documents upon which his claim rests, if it had been in his favour, he should have taken pains to have it produced and placed before us. The dakhalnama and the sale certificate upon which he relies are vague in their terms. Even if we take them as they stand they do not show that the kila was sold. The lower Courts should have seen to the production of this document. The sale-notification is a most important document, as I have repeatedly pointed out in several of my judgments, when a Court wishes to find out what was sold. I do not think that the lower Courts were justified in arriving at the finding at which they did.

By the Court.—Order of the Court is that this appeal is decreed with costs including fees in this Court on the higher scale.

V.B./R.K. *Appeal decreed.*
(2) [1909] 22 All. 163=(1909) A. W. N. 31.

A. I. R. 1915 Allahabad 409

RICHARDS, C. J. AND BANERJI, J.

Shib Sahai and others—Plaintiffs—Appellants.

v.

Saraswati and another—Defendants—Respondents.

Second Appeal No. 260 of 1914, Decided on 2nd June 1915, from decree of Addl. Judge, Moradabad.

Hindu Law—Succession—"Bandhu" means "sapinda of different gotra"—Grandfather's

great-grandson's daughter's son is not bandhu under Mitakshara.

The word "bandhu" under the Hindu law means a "sapinda" who belongs to a different gotra, that is to say, a "bhinna gotra sapinda."

Therefore for the bandhu relationship to exist it is essential that the person claiming to be the bandhu and the last owner must have been sapindas of each other. The sapinda relationship extends to seven degrees on the father's side and five degrees on the mother's side including the last owner. [P 410 C 1, 2]

A grandfather's great-grandson's daughter's son is not a "bandhu" under the Mitakshara law: *A. I. R. 1914 P. C. 1, Foll.* [P 410 C 1]

Tej Bahadur Sapru and Sunder Lal—for Appellants.

K.N. Laghate, S. C. Banerji and B. E. O'Conor—for Respondents.

Judgment.—This appeal arises out of a suit for possession of the property of one Khairati Rai. The plaintiff claims as transferee from Bulaki, who is alleged to be the bandhu of Khairati Rai and thus to have inherited his property. According to the pedigree put forward by the plaintiff in the plaint the relationship between Bulaki and Khairati Rai is this: that Bulaki is the son of the daughter of a grandson of the paternal uncle of Khairati's father. The question therefore is whether the grandfather's great-grandson's son is a bandhu under the Mitakshara law. The Court of first instance was of opinion that the plaintiff's vendor Bulaki was Khairati's bandhu ex parte materna. The learned Subordinate Judge clearly misunderstood what was meant by a "bandhu ex parte materna". According to the Mitakshara bandhus are of three descriptions, namely, the owner's own bandhus, his father's bandhus, that is "bandhus ex parte paterna" and his mother's bandhus that is "bandhus ex parte materna." There is no question of Bulaki being a bandhu ex parte materna in this case. The question what constitutes a bandhu was fully considered by their Lordships of the Privy Council in the recent case of *Ram Chandra Martand v. Vinayak Venkatesh Kothekar* (1), and the present case is practically concluded by the ruling of their Lordships. The word "bandhu under the Hindu law (as has been held in that case also) means a "sapinda" who belongs to a different gotra", that is to say, a "bhinna gotra sapinda." Therefore for the bandhu relationship to exist it is essential that

the person claiming to be the bandhu and the last owner must have been sapindas of each other. The rule of sapinda relationship has been laid down in the Mitakshara and it extends to seven degrees on the father's side and five degrees on the mother's side, including the last owner. Taking the pedigree put forward by the plaintiff which, will be found at p. 9 of the paper book, it is clear that Bulaki was one degree beyond the seventh degree counting from the last owner Khairati Rai. We are asked to count the seven degrees from the great-grandfather of Khairati, who was the common ancestor, and it is said that, computing from the common ancestor Khairati is within the seventh degree; but this computation would leave out of consideration altogether Khairati himself and his father. The mode in which relationship should be computed is stated in Sarvadhikari's *Tagore Law Lectures* (1880), p. 707, and that is a mode which the lower appellate Court has adopted. We think that the decision of that Court is right. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 410

CHAMIER AND PIGGOTT, JJ.

Yakub Ali—Judgment-debtor—Appellant.

v.

Durga Prasad and others—Decree-holders—Respondents.

Execution Second Appeal No. 1380 of 1914, Decided on 11th May 1915, from order of Addl. Dist. Judge, Meerut.

Limitation Act (9 of 1908), Art. 182—Execution application struck off on failure to reply to objection to attachment—Fresh execution after three years held to be in continuation and not barred—Execution.

In execution of a decree certain property was put up for sale. An objection was filed that a part of the property belonged to a third person. The Court asked the pleader of the decree-holder to make statement as to that by a certain date. The pleader failed to make such statement. The Court struck off the application for execution and sent the file to the record room. Three years afterwards another application for execution was made;

Held: that the second application must be treated as an application to revive the former proceedings and was not barred by time.

[P 411 C 2]

S. M. Sulaiman—for Appellant.

A. P. Dube—for Respondents.

Judgment.—The respondents on 27th August 1908, obtained a decree absolute

(1) *A. I. R. 1914 P. C. 1*=42 Cal. 384=25 I. C. 290=41 I. A. 290 (P. C.).

for sale of certain property. On 1st December 1908, they applied for execution of the decree by sale of the property of the appellant judgment-debtor and also of the share of Mt. Qulsum Bibi and two ladies named Jafri Begum and Askari Begum. The share of Mt. Qulsum Bibi had been definitely excluded from the decree for sale by the decree of an appellate Court. When the fact was brought to notice that the decree-holders wished to sell the share of Mt. Qulsum Bibi, an order was passed exempting her share from sale. Later on the Collector to whom the proceedings had been transferred discovered that the decree-holders had applied for the sale of the shares of Mt. Jafri Begum and Askari Begum also, and in January 1911 he sent the record back to the Sub-Judge for orders. On 2nd February 1911, the Sub-Judge called upon the pleader for the decree-holders to make a statement regarding the shares of the two ladies. Further time was allowed to the pleader more than once and the last date fixed for the purpose of receiving his statement was 1st March 1911. On 11th May 1911, the application for execution was struck off and the file was sent to the record room. The present application for execution was made on 20th December 1913. It was presented more than three years after the date of the last application to the Court for execution or to take some step-in-aid of execution, and the judgment-debtor has pleaded that the application is barred by limitation. The decree-holders on the other hand, have contended, and their contention has been accepted by both the Courts below, that the present application should be regarded as one made for the purpose of reviving and carrying on an execution proceeding which had been suspended by no act of default on their part.

It is true that the decree-holders' pleader failed to make a statement to the Court regarding the shares of the two ladies Jafri Begum and Askari Begum, but it does not appear that the case was called on for hearing on 1st March 1911, the last date fixed for receiving the statement of the pleader. It does not appear that either the decree holders or their pleader were even aware of the penalty which would be imposed if they failed to make the statement, and

it seems to us that when the pleader failed to make the statement, the proper course to adopt was to direct that the shares of the two women should not be sold and not to throw out the application altogether. Both the Courts below have held that it was not owing to the default of the decree-holders that their application was consigned to the record room. On the whole, we are of opinion that the view taken by the Courts below is correct and we are not satisfied that the Court, when sending the case to the record room, intended to dismiss the application for execution altogether. In the circumstances we think that the present application may properly be treated as an application to revive the proceedings which were suspended on 11th May 1911, by the order of the Subordinate Judge consigning the record to the record room. The appeal is dismissed with costs.

v.B./R K.

Appeal dismissed.

A. I. R. 1915 Allahabad 411

BANERJI AND RAFIQUE, JJ.

Rustom—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 543 of 1915, Decided on 3rd August 1915, from order of Sess. Judge, Farrukhabad.

Criminal P. C. (5 of 1898), S. 512—Omission to record finding about accused absconding and not likely to be immediately arrested is fatal to admission of evidence recorded.

A murder was committed in 1897. The accused ran away at that time and was not heard of till he was arrested in 1915. The witnesses were examined in 1897 on behalf of the prosecution to prove the commission of the offence by the accused. The Magistrate however did not record any finding that in his opinion the accused had absconded and that there was no immediate prospect of his arrest. The accused was convicted on the evidence recorded in 1897.

Held: that the evidence given in 1897 was inadmissible to prove the guilt of the accused and that the conviction was bad. [P 412 C 2]

C. Ross Alston—for Appellant.

R. Malcomson—for the Crown.

Rafique, J.—The appellant in this case is one Rustom, who was committed to the Court of Session on the charge of murder under S. 302, I. P. C. During his trial, the learned Sessions Judge added a further charge under S. 307 that is, an attempt at murder, and convicting him under that section sentenced him to transportation for life. The murder was

committed as long ago as 3rd December 1897. The case for the prosecution is that on the night of 3rd December 1897 the appellant was driving a camel cart from Farrukhabad. On his arrival at Nandsa, he had to change the camel and asked Sadullah, who was in charge of the camel that was relieved, to help him in the harnessing of the other camel and also to accompany him to the next stage. Sadullah refused to go with the appellant any further, upon which the appellant took up an axe and attacked him with it and inflicted blows on the head which resulted in almost instantaneous death. Rustom, the appellant, then ran away and was not heard of till he was arrested this year, and put on his trial. Soon after the murder, the chaukidar of the place reported the occurrence and the Sub-Inspector proceeded to the spot at once. The case was sent up to the Court on 21st December 1897, and on the same date evidence purporting to be taken under S. 512, was recorded. Subsequently it was discovered that the proceedings which were taken in 1897 were incomplete and an order was issued to the police to furnish proper evidence. This was in 1898. A proclamation under S. 87 was issued as also a warrant for the arrest of Rustom, both of which were sent to the District of Mainpuri of which district he was a resident. One Atallah, a constable of the Mainpuri District, was examined on 16th August 1898, who deposed to having made a search for the appellant and to having failed to find him. On 3rd September 1898, the witnesses who were examined in 1897 were re-examined.

Some time in April 1911, the prosecuting Inspector of Farrukhabad, presumably on going through the old files, came upon the file of this case. He reported that the evidence which purported to have been taken under S. 512, Criminal P. C., was not legally correct and recommended that fresh proceedings should be taken. In accordance with his suggestion, the case was again taken up by a Magistrate of the district and formal evidence of the appellant having absconded was recorded and the only surviving witness, Mt. Vilayatan, was examined. These facts we have discovered by going carefully through the files of 1897, 1898 and 1911, which are in the record of this case. The only evidence

against the appellant on his trial in the present case consists of the deposition of Mt. Vilayatan who is alive and was examined before the learned Sessions Judge, and the depositions of four other witnesses who were examined in 1897, namely, Imtiazan, Husaini, Mohan and Ram Singh. The learned Sessions Judge, by a formal order dated 21st June 1915, brought the statements of the said four witnesses on the record as evidence on behalf of the prosecution. We also find the evidence of the said four witnesses recorded in 1898 on the file of the Sessions Court, though no order appears on the file showing how and when and under what circumstances were those statements brought on the record. The evidence of Mt. Vilayatan as recorded by the learned Sessions Judge at the present trial was rejected by him. The conviction of the appellant rests on the statements of the other witnesses recorded in 1897. The learned counsel for the appellant contends that the said evidence is inadmissible, inasmuch as no proof of the absconding of the accused had been formally received and recorded prior to the examination of the said witnesses.

We think that this objection is valid and must prevail. In S. 512 it is distinctly laid down that if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. It is clear from the language of the section that the Court which records the proceedings under it, must first of all record an order that in its opinion, it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. No such finding appears on the file of 1897; in fact no evidence was taken in that year to show that the present appellant was absconding and that there was no immediate prospect of his arrest. The evidence of 1897 being inadmissible, the conviction of the appellant on the basis of such evidence cannot stand. But it is suggested on behalf of the Crown that the case should be sent back for retrial with a direction to the learned Sessions Judge to admit

the evidence taken in 1898, inasmuch as that evidence was taken after proof had been received of the absconding of the accused.

We find that the only statement in 1898 with regard to the absconding of the accused is that of one Ataulab, a constable of the Mainpuri District. He does not say that there is no immediate prospect of the arrest of the accused, nor is there any finding by the Magistrate that he is satisfied that the accused is absconding and that there is no immediate prospect of his arrest. Moreover, we have considered the evidence of the other witnesses who were examined, in 1898 and are of opinion that their evidence is insufficient to bring the charge home to the appellant. Of the witnesses examined in 1898, Mt. Vilayatn cannot be relied upon. Mohan Chamar and Mahomed Yusuf distinctly say that they did not see Rustom, the appellant, strike the deceased. The other witnesses Intiazan, Ram Singh and Husaini do say that they recognized Rustom as the assailant of the deceased. It should be observed here that none of the witnesses was present actually on the spot when the assault on Sadullah is said to have taken place. All the witnesses say that they ran upon hearing the cries of Sadullah. Intiazan and Husaini also ran up. It was a dark night and according to Mahomed Yusuf, it was not possible to recognize any person at any distance. There is therefore room for doubt as to the evidence of Intiazan, Husaini and Ram Singh. In our opinion, it would serve no useful purpose to send back the case for retrial with the direction to admit the evidence taken in 1898. We therefore accept the appeal, set aside the conviction and sentence passed upon the appellant and acquit him of the offence of which he has been convicted, and direct his immediate release.

Banerji, J.—I concur.

V.B./R.K. *Appeal allowed.*

A. I. R. 1915 Allahabad 413

RICHARDS, C. J. AND BANERJI, J.
Nathu and another—Appellants.

v.

Mt. Gokalia and another—Respds.

Second Appeal No. 1175 of 1914, Decided on 19th July 1915, from decision of District Judge, Moradabad, D/- 20th May 1914.

Agra Tenancy Act (2 of 1901), S. 22—Tenant died before 1901—Widow succeeded—She died after the Act leaving daughter—Collaterals of tenant cannot succeed.

P, who was an occupancy tenant, died prior to the passing of Act 2 of 1901. His widow succeeded to his holding. The widow died leaving a daughter while Act 2 of 1901 was in force. The collaterals of *P* sued the daughter for possession of the holding and some of them alleged to have been in joint cultivation with *P*.

Held: that the plaintiffs could not succeed to the holding after the death of the widow. 23 I. C. 100, *Fell*; 20 I. C. 7; 5 I. C. 384, *Ref.* [P 414 C 1]

M. L. Agarwala—for Appellants.

Mohan Lal Sandul—for Respondents.

Judgment.—This appeal arises out of a suit in which the plaintiffs claimed possession of an occupancy holding. The holding at one time belonged to one Parbhu. He died before the present Tenancy Act came into force. He was succeeded by his widow, who remained in possession for a number of years and died after the present Act came into force. The plaintiffs alleged themselves to be brothers and nephews of Parbhu, and two of them allege that they were joint in cultivation with Parbhu. The principal defendant is the daughter of Parbhu. The Court of first instance dismissed the plaintiff's suit and this decision was affirmed by the lower appellate Court.

On behalf of the appellant the case of *Mt. Sumari v. Jageshar* (1) has been cited; also an unreported decision in Second Appeal No. 1118 of 1914. On the other side the case of *Dulari v. Mul Chand* (2) and also the case of *Deoki Rai v. Parbati* (3) are cited. It seems to us that the plaintiff in a suit for ejectment had to prove a title vested in him which gave him a right to the possession of the land in dispute. S. 22, Agra Tenancy Act, provides for the devolution of the interest of an occupancy tenant, but it is perfectly clear from the language of the section that it only provides for such devolution where the tenant dies after the passing of the Act. If we regard Parbhu's widow as the full tenant of the occupancy holding, the plaintiffs have no right, because they are not the male lineal descendants of Parbhu's widow, nor did they share in the cultivation with her. If we consider that Parbhu was the last full tenant and that his widow only succeeded to a widow's estate, then

(1) [1913] 20 I. C. 7.

(2) [1910] 32 All. 314=5 I. C. 384.

(3) [1914] 23 I. C. 100.

it seems to us that S. 22, Tenancy Act, has not provided for the devolution in such a case. It is admitted that at the time of Parbhu's death the present plaintiffs could not have succeeded even if Parbhu left no widow. In the unreported case to which reference has been made a learned Judge of this Court says:

"the Board of Revenue appears to have taken a decided view that in circumstances like the present a succession would be governed by the provisions of S. 22, Act 2 of 1901."

We doubt if this statement is quite accurate. So far as we are aware the practice of the Board of Revenue is to look upon the party who has succeeded to the occupancy holding as the "full tenant." We have pointed out that even if this be the true aspect, the plaintiffs would have no right to succeed. We think that in principle the present case is governed by the case of *Deoki Rai v. Parbati* (3). We think that the view taken by the Courts below was correct and ought to be affirmed. We accordingly dismiss the appeal with costs.

V B/R.K. *Appeal dismissed.*

A. I. R. 1915 Allahabad 414

CHAMIER AND PIGGOTT, JJ.

Munna Lal — Judgment-debtor—Appellant.

v.

Radha Kishan — Decree-holder—Respondent.

First Appeal No. 13 of 1915, Decided on 21st June 1915, from order of Sub-Judge, Muttra.

Civil P. C. (5 of 1908), O. 21, R. 89—Money deposited next day after 30 days because though tendered was refused on previous day—Held deposit in time, judgment-debtor having done all that was possible.

A judgment-debtor applied to set aside a sale on the last day of limitation and tendered the money to the Treasury Officer shortly before 3 p. m., the hour at which the Treasury is closed to the public. The Treasury Officer refused to take the money as it was too late to count. He however observed that the money could be paid at any time within three days of the tender. The judgment-debtor consequently paid the money next day after 30 days had expired:

Held: that the judgment-debtor having done all that was possible for him to do to pay the money into the Treasury within time must be taken to have paid the money in accordance with law. [P 415 C 1]

Jawahar Lal Nehru for *Motilal Nehru* —for Appellant.

Lalit Mohan Banerji and *Sham Krishna Dar* —for Respondent.

Judgment.—This is an appeal by a judgment-debtor against an order of the Subordinate Judge of Muttra, refusing to set aside a sale held in execution of a decree. The sale took place on 7th August 1914. As 6th September was a Sunday the judgment-debtor was entitled to make an application under O. 21, R. 89, and pay the sum specified in that rule on 7th September. The evidence shows that the judgment-debtor was not able to raise the money required for the purpose until about 2 o'clock on the afternoon of 7th September. According to the evidence on 7th September he made an application to the Court with tender in the prescribed form No. 43 duly filled in, and obtained thereon an order of the Court that the money should be deposited in the Treasury. He took the money to the Treasury shortly before 3 p. m., the hour at which the Treasury is closed so far as the public are concerned.

The Treasury Officer looked at his watch and said that it was too late to count the money (Rs. 12,735-9-0) on that date and he observed that the money could be paid at any time within three days of the tender. He was probably referring to the words on the duplicate tender, "receive and credit the above sum if tendered to you within three days." But these words cannot be used for the purpose of extending the period of limitation allowed by law. They are intended to facilitate the checking of the accounts kept by the Court. The judgment-debtor says that he accepted the statement of the Treasury Officer as correct, and as the Treasury Officer declined to take the money, he took it away and paid it into the Treasury on the following day. The Subordinate Judge has held that it is not proved that the money was tendered before 3 p. m., on 7th September and has accordingly declined to set aside the sale. The evidence that the money was tendered to the Treasury Officer before 3 p. m., is however uncontradicted and should, we think, be accepted. The question however is whether under the circumstances, the payment required by O. 21, R. 89, Civil P. C., should be taken to have been made within the time allowed by law. The learned counsel for the judgment-debtor relies upon the decision of the Calcutta High Court in *Mahomed Akbar Jaman Khan v. Sukhdeo Panday* (1), in

which it was held in accordance, with the principle *actus curiae neminem gravabit*, that the payment must be taken to have been made in time where the judgment-debtor had applied to the Court under-R. 89, O. 21, on the 30th day from the sale and was ready to deposit the required sum in Court and the challan to the Treasury had been duly filled up and placed in the hands of the proper officer, but the signature of the presiding officer of the Court could not be procured on that day as he had left the Court. The result was that the challan was signed on the following day and on the authority of it the money was received by the Treasury Officer. The Calcutta High Court held that the application of the judgment-debtor to have the sale set aside should under the circumstances have been allowed. The present case is not on all fours with the Calcutta case. In the latter it was quite clear that the Court by its own action had prevented the judgment-debtor from paying the money into Court within time.

In the present case the question is what the Treasury Officer ought to have done when the money was tendered to him shortly before 3 p. m., on 7th September. We are not satisfied that the Treasury Officer could not have arranged for the safe custody of the money until it could be counted in the presence of the judgment-debtor, and we think that it is probable that he would have made some such arrangement if he had not been under the impression that the judgment-debtor was entitled to three days from the date of the tender within which to pay the money into the Treasury. Under the circumstances we think that it should be held that the judgment-debtor in this case did all that it was possible for him to do to pay the money into the Treasury on 7th September, i.e., within time, and that he was prevented from paying the money by the action of the Treasury Officer, who for this purpose must be regarded as an Officer of the Court. We therefore allow this appeal, set aside the order of the Subordinate Judge, and direct that the application be disposed of according to law. We make no order as to the costs of this appeal.

V.B./R.K. *Appeal allowed.*

(1) [1911] 10 I. C. 51.

A. I. R. 1915 Allahabad 415

RICHARDS, C. J.

Hakim Singh and others—Applicants.
v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 633 of 1915, Decided on 10th August 1915, from order of Dist. Magistrate, Mainpuri.

Criminal P. C. (5 of 1898), S. 110 — Evidence of good character by accused should not be lightly brushed aside.

Where proceedings under S. 110 are taken against a person and he is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention to such evidence. It should not necessarily be believed but the Court should find substantial reason for not believing the evidence before it makes an order. [P 316 C 1]

Sital Prasad Ghose and Uma Shanker Bajpai—for Applicants.

R. Malcomson—for the Crown.

Judgment.—The five appellants Hakim Singh, Dal Singh, Gandharp Singh, Hukam Singh, and Khem Singh have been ordered to furnish security under S. 110, Criminal P. C. All five are thakurs. Hukam Singh and Dal Singh reside in one village, the other three in another village. Hukam Singh and Dal Singh have been represented by Mr. Bajpai, whilst the other three applicants have been represented by Mr. Sital Prasad Ghose. They were separately represented in the Court below also. I have gone carefully through the evidence on both sides. The learned District Magistrate in confirming the order of the Court below says:

"There is no doubt that the Magistrate has admitted a great deal of evidence which was quite inadmissible, for instance, the evidence of suspicions without any tangible ground having been stated for these suspicions, also second hand evidence or mere hearsay about what some person told another person and that person not being produced as a witness and so forth."

He then proceeds to say that in dealing with the evidence for the prosecution, he will eliminate all such evidence. All the applicants are possessed of some zamindari and cultivation. Of course it by no means follows that because a man is the owner of some zamindari, he is not a badmash. At the same time the fact that he has some property and position ought to be taken into consideration when dealing with a person under the provisions S. 110. The evidence, in my opinion, given in the Court of first instance, was very unsatisfactory and very vague. The statements were made against all seven persons who were then charged in a "lump." Witness after witness says:

"All these persons are bad characters." The Magistrate ought to see that the witness is really speaking and has reason for speaking against each. If I were trying the case as a Court of first instance, I hardly think that I would feel justified, on the evidence, in binding the accused over under S. 110; at the same time I must bear in mind that this is not the Court upon whom rests the responsibility of administering the provisions of S. 110, I can only deal with the case in revision. Accordingly unless I can find some substantial grounds for thinking that the Court below has gone astray, I ought not to interfere. In the present case, I think such grounds do exist. The Court below has wiped out all the evidence that was given on behalf of Hukam Singh and Dal Singh simply because it was of opinion that the thakurs had held a panchayat in connexion with this case. It seems to have thought that it necessarily follows that the evidence given in support of the good character of the applicants was false because it was the result of a panchayat. No doubt it might happen that the thakurs would take up the case of the accused and come to a decision to support them at all hazards, quite irrespective of the merits. On the other hand, it might very well be that the thakurs of the neighbourhood might have reason to think that their fellow-castemen were not being fairly treated and that all that they did was to lend support to witnesses ready to come forward and to speak the truth. I have a great dislike to lay down any hard and fast rule as to how cases under S. 110 should be dealt with.

Each case should be dealt with on its own facts and circumstances. I think, however one rule may very safely be laid down, and that is this: Where proceedings under S. 110 are taken against a person and he is able to produce witnesses on his behalf to speak of his good character, the Court ought to pay particular attention to such evidence. I do not mean to say that it should necessarily be believed, but the Court should find substantial reason for not believing the evidence before it makes an order. Badmashes who happen to be rich or influential may, of course, be able to procure false evidence as to their character. But speaking generally, I think a person who really is a notorious bad character

would find considerable difficulty in getting a large number of his neighbours to come forward and speak to his good character. In the present case, after carefully reading the judgments of both the Courts of first instance and of the District Magistrate, I am of opinion that proper attention has not been paid to the evidence which all of the five applicants adduced. Under the special circumstances of this case, I think that the order both of the Magistrate and of the District Magistrate should be set aside. I accordingly allow the application, set aside the order of both of the Courts below and the accused will be released if in custody. If they have given security, such security will be cancelled.

V.B./R.K.

Order set aside.

A. I. R. 1915 Allahabad 416

TUDBALL, J.

Damodar Das—Defendant—Appellant.
v.

Tilak Chand—Plaintiff—Respondent.

Second Appeal No. 1084 of 1914, Decided on 14th June 1915, from decree of Addl. Judge, Saharanpur.

Easements Act (5 of 1882), S. 23—Building three storeyed pukka house with five spouts to discharge water in place of single storeyed thatched roof is increasing burden.

The defendant had a single-storeyed house with a thatched roof. One portion of the thatched roof discharged the rain water on the plaintiff's land between the houses of the two parties. He removed his thatched house and built a three storeyed pukka house with five spouts on the roof to discharge water on to the land.

Held, that there was a considerable increase of burden within the meaning of S. 23, Easements Act. [P 417 C 1]

Nihal Chand - for Appellant.

S. A. Haidar—for Respondent.

Judgment.—The sole question in this appeal is whether the defendant has increased the burden within the meaning of S. 23, Easements Act. The facts are simple. The defendant had a single-storeyed house with a thatched roof. One portion of the thatched roof discharged the rain water on a small lane between the houses of the two parties. He has removed his thatched house and has now built a three-storeyed pukka house and he has put spouts on the roof of the house to discharge water on to the land between the plaintiff's wall and his wall. The Court of first instance held that there was really no increase in the burden except where the water from one

spout fell on to the wall of the plaintiff's house. That spout, the Court ordered, should be altered in its direction. The lower appellate Court has held that the spouts clearly threw an additional burden on the servient heritage. It seems to me that there can be no question that there is a considerable difference between the burden which the servient heritage formerly bore and that which it now bears. In the first place double the quantity of water now falls upon it. The roof of the defendant's house was a sloping roof. Half of the water fell in one direction and the other half in another direction. It is now a flat roof and the whole of the water is discharged through five apertures and falls from a greatly increased height on to the land below it. In my opinion there has been a considerable additional burden placed upon the plaintiff's land and the order of the Court below in regard to the spouts on the roof on the second floor of the defendant's house is fully justified. If the defendant wishes to discharge his water on this land, he must so arrange that there is no addition to the burden which the servient heritage bore. The burden he has now placed upon it is a considerably increased one and in my opinion there is no force in this appeal. It is therefore dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 417

RICHARDS, C. J. AND PIGGOTT, J.

Bateshar and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 341 of 1915, Decided on 29th June 1915, from order of Sess. Judge, Cawnpore.

(a) Criminal P. C. (5 of 1898), S. 537—Without examining complainant Magistrate sent for police report and summoned accused—Accused discharged as complainant absent—On subsequent appearance of complainant, he and witnesses were examined—Accused then summoned and tried and convicted—Trial held not irregular one.

A complaint was made before a Magistrate. The Magistrate without at once examining the complainant, sent for the papers of the police investigation and summoned the accused and fixed a date asking the complainant to proceed with the case independently on that date. On the date so fixed, the accused appeared, but the complainant did not. The Magistrate discharged the accused. Subsequently on the same date the complainant appeared and explained

the cause of his delay. The Magistrate again, without examining the complainant fixed another date giving the complainant opportunity to examine his witnesses. On the date so fixed the complainant and his witnesses were examined and a process was issued against the accused. Subsequently the accused were convicted of the offences complained of:

Held, that there was no sufficient cause to set aside the conviction on the ground of irregularity. [P 418 C 1]

(b) Penal Code (45 of 1860), Ss. 323 and 325—When simple and grievous hurts caused in same affair, cumulative sentences can be passed.

Where different persons are injured, grievous hurt is caused in one case and simple hurt in others, the Magistrate is competent to pass cumulative sentences. [P 418 C 2]

W. Wallach—for Applicant.

R. Malcomson—for the Crown.

Judgment.—This is an application in revision. The facts are briefly as follows: A complaint was made to the police in which the complainant complained that he and certain other persons had been beaten by the present applicants, and that one of them had suffered injuries amounting to grievous hurt. The police do not appear to have been very anxious to initiate proceedings. The result was that the complainant came before Mr. Williamson, a Magistrate of the First Class, with what amounted to a "complaint" though no doubt it was to a certain extent also a complaint against the police for not moving in the matter. This was on 8th February. The Magistrate made an order in the following terms:

"Papers of the police investigation to be produced before me on 16th February. The complainants, if they wish to prosecute their case independently of the police, should produce evidence on that date and also summon the accused."

This order was not regular. There was no objection, of course, to the Magistrate sending for the police papers. On the contrary it was a very correct thing for him to do but under S. 200, Criminal P. C., he ought at once, and before he summoned the accused, to have examined the complainant on oath. On 16th February for some reason or other the complainants did not turn up. The accused were in Court and the Magistrate made an order of discharge under S. 259, Criminal P. C. The very same day the complainants turned up and evidently explained to the learned Magistrate how it was that they were unable to be present in Court. Thereupon the Magistrate made the following order:

"The applicants appeared after the rising of the Court, having arrived by a late train. In view of the police report and the departure of the accused it will be sufficient to allow applicants so much grace as to give them an opportunity of showing, under S. 202, Criminal P. C., whether they can support their case by evidence. To 23rd February for this purpose."

This order is dated the 17th, although the corresponding vernacular order in the order sheet is dated the 16th. On 23rd February the complainant and four witnesses were examined and process was ordered to issue for the accused. The proceedings against them began on 8th March. The Magistrate again, on 16th or 17th February, in a lesser degree, made the same mistake as he had made in the previous order. He did not at once examine the complainants on oath. It is contended in revision that the conduct of the Magistrate amounts to such an illegality that it vitiates the entire proceedings. It is admitted however that according to the rulings and practice of this Court an order of discharge is no bar to the Court taking cognizance of the case upon a fresh complaint or a fresh police report, notwithstanding that the complaint or police report refers to the very same offence in respect of which the accused had previously been discharged. It follows from this that if the Court had never made the order dated the 17th February, and that on 23rd February the complainant, in the presence of the Magistrate, explained to him why it was he had been unable to attend on the 16th, and had then made an oral complaint to the Magistrate, the proceedings which led to the issue of process and the subsequent trial would all have been regular. It seems to us that the irregularity in the previous orders cannot, under the circumstances of the present case, be said to vitiate the proceedings. At the same time we wish very strongly to impress upon the learned Magistrate that the provisions of the Code as to procedure ought to be strictly complied with. Non-observance of the provisions of the Code leads to much confusion and waste of public time, not to speak of involving the parties in unnecessary expense. Under the circumstances of this case we see no sufficient ground for setting aside the conviction on the ground of the irregularity in the issuing of process to the accused.

The second point raised in the applica-

tion is that cumulative sentences were illegal. It seems to us that there is no force in this contention. Different persons were injured, grievous hurt was caused in one case and simple hurt in others. Therefore it was competent for the Court to impose separate and cumulative sentences.

The only other matter is a question of severity of sentence. The injuries in most of the cases were simple. In one case there was a broken finger and the infliction on the head of a wound which laid bare the bone. No doubt these injuries were of a serious nature. There are however some circumstances connected with the case in which it is unnecessary to go in detail but we have considered these circumstances, and we think that the ends of justice will be met by making the sentences passed run concurrently. We order that the sentences of imprisonment passed on Bateshar and Mathura shall run concurrently instead of consecutively. In all other respects we dismiss the application. The applicants must surrender to their bail.

V.B./R.K.

Order modified

A. I. R. 1915 Allahabad 418

RICHARDS, C. J.

Emperor

v.

Ram Dayal and others - Opposite Parties.

Criminal Ref. No. 757 of 1915, Decided on 9th September 1915, made by Sess. Judge, Budaun.

Penal Code (45 of 1860), S. 379—Removal must be dishonest to constitute theft.

Before an accused can be found to be guilty of the offence of theft, it must be found that he dishonestly took some property out of the possession of another person.

Where a tenant believing that a legal distraint had been made by his landlord of the crops of his holding which had been previously attached in execution of a decree against him cut and removed the crops.

Held: that the tenant was not guilty of theft inasmuch as he could not be said to have dishonestly taken the property out of the possession of any other person. [P 419 C 1]

R. Malcomson—for the Crown.

Judgment.—It appears that a decree was obtained against certain tenants. The karinda of the landlord purported to distrain the crops which had been attached in execution of the decree. The cultivators then cut and carried away the crops. They were charged under S. 379 with having committed theft and sen-

tenced to one month's rigorous imprisonment each. The learned Sessions Judge, on the matter coming up before him in revision, thought that the fact that the landlord had distrained the crops, made this subsequent cutting and taking away of the crops by the accused lawful. He considered that this would be so, notwithstanding that the distraint might have been more or less collusive between the landlord and his tenants. He therefore thought the accused were wrongly convicted. The learned Magistrate has explained that in his opinion, distraint having been made by an agent who was not authorized in writing, was illegal and that therefore the illegal distraint could not justify the removal of the crops. The learned Sessions Judge points out that the distress was held to be lawful by the revenue Court. In my opinion it is unnecessary to decide whether or not the distress was lawful. A landlord who has rent due to him is entitled to distrain, notwithstanding that the result of the distraint may be in whole or in part to defeat the execution of the decree. Before the accused could be found to be guilty of the offence of theft, it must be found that they dishonestly took the property out of the possession of another person. If the present accused believed that a legal distraint had been made by their landlord and in such belief cut and removed the crops, I do not think that they could be said to have "dishonestly" taken the property out of the possession of any other person. The accused of course are entitled to the benefit of any reasonable doubt and I think it may very well have been that the accused in the present case honestly believed that the distraint had been made by their landlord. I set aside the conviction and sentences passed upon the accused. If they are in prison, they will be released. If they are on bail, they and their sureties will be released.

V.B./R.K. *Conviction set aside.*

A. I. R. 1915 Allahabad 419

RICHARDS, C. J. AND TUDBALL, J.

Suraj Bhan—Defendant—Appellant.

v.

Somwarpur—Plaintiff—Respondent.

First Appeal No. 65 of 1914, Decided on 26th July 1915, from an order of Dist. Judge, Allahabad.

Bundelkhand Land Alienation Act (2 of 1903), S. 3—S. 3 applies to voluntary transfers—Sanction not necessary to pre-emption suit.

There is no provision in the Land Alienation Act, which entitles an intending pre-emptor to get the sanction of the Collector to bring a suit for pre-emption. The sanction contemplated in S. 3 of the Act applies to a voluntary transfer.

[P 419 C 2]

Durga Charan Banerji and Haribans Sahar—for Appellant.

Sundar Lal—for Respondent.

Judgment—This appeal arises out of a suit for pre-emption. The plaintiff pre-emptor has been found by both the Courts to be a person who was not entitled to purchase the property in question having regard to S. 3, Land Alienation Act 2 of 1903, inasmuch as he was not a member of an agricultural tribe. The Court of first instance dismissed the plaintiff's suit on this ground. The lower appellate Court seems to have considered that the Court might make a decree in the plaintiff's favour subject to the consent of the Collector to be subsequently obtained, and remanded the case. We think the view taken by the learned District Judge was not correct. The plaintiff's alleged cause of action was the fact that the vendor, being bound by a custom of pre-emption to first offer the property to the plaintiff, did not do so. We think that the Act, which provides that the property should not be sold to the pre-emptor, entirely absolved the vendor from any obligation to first offer the property to the pre-emptor. It is said that the subsequent sanction of the Collector might smooth over all these difficulties. It seems to us that the Court's jurisdiction was either to grant a decree for pre-emption or not to do so. It would be obviously open to many objections that the sale of the property should be kept in abeyance until such time the Collector sanctions or refuses to sanction the sale. We may also point out that it is extremely doubtful whether the Collector could give any such sanction to a pre-emptor. There is no provision in the Act which entitles an intending pre-emptor to get the sanction of the Collector to bring a suit for pre-emption. If the sanction of the Collector could not be obtained before the bringing of the suit, it seems a fortiori that he could not grant the sanction subsequently. The sanction contemplated in S. 3 is clearly in the case of a voluntary

transfer. We allow the appeal, set aside the order of the learned District Judge and restore the decree of the Court of first instance with costs in all Courts

V.B./R.K.

Appeal allowed

*** A. I. R. 1915 Allahabad 420**

CHAMIER AND PIGGOTT, JJ.

Dambar Singh—Decree-holder—Appellant.

v.

Munawar Ali Khan and *another*—Judgment-debtor—Respondents.

First Appeal No. 96 of 1914, Decided on 28th May 1915, from decree of Sub-Judge, Meerut.

*** Civil P. C. (5 of 1908), S. 11—Various execution applications—Judgment-debtor's objection on ground of nonliability allowed in one—In subsequent execution same objection raised but dismissed for default—In the next execution dismissal of objection was held to be res judicata.**

A decree for possession of property and costs was passed against several persons. On an application for execution of this decree a compromise was entered into between the decree-holder and some of the judgment-debtors, who had been pro forma defendants by which the decree-holder admitted that he had no claim against these judgment-debtors. The decree-holder sold the decree and the transferee applied for execution against these judgment-debtors as well. They objected and it was decided that they were no longer liable. The transferee in another application for execution again joined these judgment-debtors and attached their property. They made an objection but they allowed it to go by default. In another application for execution against them they again made the same objection ;

Held ; that the later of the two inconsistent decisions in the proceedings must prevail against the earlier and that the objection was barred by the rule of res judicata ; 1 A. L. J. 416 and 6 A. L. J. 420 *Ref.* [P 420 C 2]

P. L. Banerjee—for Appellant.

Abdul Raouf—for Respondents.

Chamier, J.—One Sri Kishan Das obtained a decree for possession of property and costs against several persons including the respondents. When execution was taken out in 1905, the respondents protested that they had never been anything but pro forma defendants and that the decree should not be interpreted as making them jointly liable for costs along with other defendants who had contested the suit. A petition of compromise was filed on 20th April 1906 in which the decree-holder admitted in express terms that he had no claim against the respondents under the decree and this compromise was made the basis of an order of the Court releasing the

property of the respondents from attachment. Shortly after that the decree-holder sold the decree to the appellant, who in 1907 took out execution against the respondents. They put in an objection and the Court decided that the respondents were no longer liable under the decree. The appellant brought the case before this Court on appeal, and this Court held expressly that there had been a complete adjustment of the decree as between the original decree-holder and the respondents and that the appellant was bound thereby. Notwithstanding the decision of this Court the appellant in April 1910 again took out execution against the respondents and attached a sum of Rs. 28-8-0, which happened to be in Court to their credit, and at the same time he asked for the attachment of a much larger sum against the other judgment-debtors. The respondents put in a petition of objection pleading that they had been discharged from liability under the decree, that property attached previously had consequently been released, and that the application for execution was contrary to previous orders passed by the Court. But the respondents allowed their objections to go by default, with the result that the application for execution was allowed and the money attached was paid out of Court to the appellant.

The present application for execution was presented in June 1913. The respondents objected on the ground that it has been held more than once during the course of the execution proceeding that they are no longer liable under the decree. The appellant's contention was and is that the Court order dismissing the respondents' objection in 1910 coupled with its order allowing the decree to be executed against the money belonging to the respondents, has the effect of wiping out the previous decisions passed in favour of the respondents and on the principle of res judicata debars the respondents from pleading that the decree has been adjusted so far as they are concerned. It is conceded that the later of two inconsistent decisions in the course of execution proceedings must prevail against the earlier: *Mallu Mal v. Jhamman Lal* (1) and *Rai Sham Kishore v. Ugrah Narain Singh* (2). The

(1) [1904] 1 A. L. J. 416.

(2) [1909] 6 A. L. J. 420.

question is whether the order passed against the respondents in 1910 should be regarded as a decision that the decree had not been adjusted so far as the respondents are concerned and that they were still liable for the balance of the costs decreed. The respondents' contention is that the order of the Court decided no more than that the respondents were in 1910 liable for a sum of Rupees 28-8-0. I am unable to accept this contention. The respondents' petition of objection distinctly raised the question whether they were liable under the decree or had been discharged from liability by the orders previously passed. No question of the extent of the respondents' liability was before the Court. The dismissal of their objections resulted no doubt in the sum of Rs. 28-8-0 only being paid out of Court to them, but the Court did not apply its mind to the question of the extent of the respondents' liability. It must, in my opinion, be taken to have decided that the decree had not been adjusted as alleged by the respondents; consequently execution might proceed as against them. It was also suggested that the appellant's application for execution, directed as it was against other persons than the respondents, was calculated to put them off their guard and to lead to them to suppose that as only a small sum of money belonging to them had been attached and a much larger sum had been attached as against other persons, they had only to allow the small sum of Rs. 28-8-0 to be paid to the respondents in order to be rid of the whole business. The answer to this is that respondents were in no way misled by the appellant's application. They came in at once with a petition of objections and their failure to press it is not explained.

I am reluctantly driven to the conclusion that the decision of 1910 neutralized the previous decisions and left the respondents liable for the balance of the decree for costs. I would therefore allow this appeal, set aside the order of the Court below dismissing the application for execution, and direct that the application be restored to the pending file and disposed of according to law. Costs of this appeal should be costs in the cause.

Piggott, J. I concur.

By the Court The order of the Court is that the appeal is allowed, and the order of the Court below is set aside with this direction that the application for execution be restored to the pending file and disposed of according to law.

V.B./R.K.

Appeal allowed.

*** A. I. R. 1915 Allahabad 421**
Full Bench

KNOX, RAFIQUE AND PIGGOTT, JJ.

Mt. Jiban Kuar—Applicant.

v.

Govind Das—Opposite Party.

Civil Misc. Case No 183 of 1915, Decided on 29th October 1915, reference made by Board of Revenue, U. P.

*** Stamp Act (2 of 1899), Sch. 1, Arts. 45 and 55—Rivals claiming full and sole ownership—Compromise by release of portion—Deed executed is deed of release and not of partition—Stamp duty leviable under Art. 55.**

Where each of the two rival claimants to a property claims to be the sole and full owner of the property but in order to avoid litigation agrees to release in favour of the other a certain portion of it, the deed executed by either of them is a deed of release and not a deed of partition and is liable to a stamp duty under Art. 55, Sch. 1, Stamp Act, 9 Bom. 417, *Foll.* [P 422 C 1]

Tej Bahadur Sapru—for Applicant.

Sital Prasad Ghose—for Opposite Party.

Judgment—The following case has been stated by the Chief Controlling Revenue Authority of these Provinces to this Court under S. 57, Stamp Act of 1899. The case stated runs as follows: On 23rd August 1914, one Mathura Das died childless, leaving property of the estimated value of Rs. 2,25,000. The sister of the deceased applied for Letters of Administration. Govind Das, a collateral of Mathura Das, disputed her claim. Eventually the two claimants effected a compromise, and to give effect to this compromise both the parties executed separate instruments of even date on 14th September 1914. Each instrument was treated as a deed of release and was stamped with a stamp of Rs. 5. The instrument executed by Gobind Das was presented for registration and was impounded by the Sub-Registrar, who considered it to be an instrument of partition chargeable with a duty of Rs. 375. The instrument was sent to the Collector, who considered it to be a release and referred the case to the Board of Revenue under S. 56 (2) of the Act. The Chief Controlling Revenue Authority give it as their opinion that the two

deeds read together constitute an instrument of partition liable to a duty of Rs. 375 under Art. 45, Sch. 1, Stamp Act. But as they consider the question as one of some difficulty, the case has been referred to this Court. No one appears on behalf of the Chief Controlling Revenue Authority. The lady is represented in this Court by the Hon'ble Dr. Tej Bahadur Sapru, and Mr. Sital Prasad Ghose appears for Gobind Das. We have heard the former advocate. The deeds have been read over to us. We have carefully considered their contents and we are satisfied that as the deeds stand, they are instruments of release within the meaning of Art. 55, Sch. 1, Stamp Act. The case as put by the lady in her deed is that under the Mayukha Law, she is the owner of the property left by the deceased Mathura Das. The case as put by Govind Das in the document executed by him is that under the Mitakshara Law, he is the sole owner of the property in question. Neither of them states himself or herself as co-owner with the other, nor can they do so rightly. We therefore have not a case of persons purporting to be co-owners of the property and agreeing to divide the same. Each party before us claims to be the sole and full owner and in order to avoid litigation agrees to release in favour of the other a certain portion of the property which he or she claims to be his or her property in full. The Board of Revenue has cited *Reference under Stamp Act*; S. 46 (1) as applicable to this case. But that was a case in which the parties purported to be the co-owners of the property. The view which we take is supported by *Ek Nath S. Gownde v. Jagannath S. Gownde* (2) and *Reference under Stamp Act*, S. 46 (3). We direct that this be returned to the Chief Controlling Revenue Authority as our decision in this case. The deeds will be returned with the decision.

V.B./R.K.

*Order accordingly.***A. I. R. 1315 Allahabad 422**

CHAMIER, J.

Ghasi Ram and another—Plaintiffs—Appellants.

v.

Mt. Kishna and others—Defendants—Respondents.

Second Appeal No. 1241 of 1914, Decided on 25th June 1915, from decree of Addl Sub-Judge, Bareilly.

Limitation Act (9 of 1908), Art. 134—Private purchaser from auction-purchaser of mortgagee's rights can rely on Art. 134 if purchase is bona fide of absolute title

A person who purchases by private treaty from an auction purchaser of the rights of the original mortgagee is entitled to rely upon Art. 134, Lim. Act, 1908, if he purchases in the bona fide belief that he is purchasing an absolute title. [P. 423 C 1]

Haribans Sihal and Gokul Prasad—for Appellants.

Jang Bahadur Lal—for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs for possession of property which was mortgaged as long ago as 6th September 1856, by Shambhu, under whom the plaintiffs claim, to a man named, Hulasi. The plaintiffs claimed to be entitled to redeem the mortgage. They said that defendants 1—7 were owners of the mortgagee rights. Those defendants resisted the suit on the ground that they had become proprietors of the property. In April 1877, the rights and interests of the mortgagee were put up to sale and purchased by one Ghasi. In January 1884, Ghasi sold to defendants 1—3 half the rights which he had acquired at the auction sale, and in December 1888, he sold to the predecessor-in-title of defendants 4—7 not only the mortgagee rights which he had acquired at the auction sale, but what he represented to be an absolute proprietary interest in the property, for a sum of Rs. 100. The suit has been decreed as against defendants 1—3 on the ground that they are not entitled to the protection of Art. 134, Sch. 1, Lim. Act, but it has been dismissed against defendants 4—7 on the ground that what Ghasi purported to sell to them and what they purchased from him was an absolute proprietary interest in the property which they held. Here I may note that they have been in possession of the property since December 1888. This appeal is brought only against defendants 4—7.

It is contended that Art. 134 does not apply to the case because defendants

(1) [1889] 12 Mad. 198.

(2) [1885] 9 Bom. 417.

(3) [1895] 18 Mad. 223.

4-7 did not purchase from the original mortgagee of the property. It is conceded that a purchaser from the son or other heir of the original mortgagee of the property would be entitled to rely upon Art. 134, but it is contended that a person, who purchases from the auction purchaser of the rights of the original mortgagee, is not entitled to rely upon that article. Several cases supposed to bear upon this question have been cited to me; but on examination they are all found to be totally irrelevant, and it is useless to discuss them. I have no hesitation in holding that a person who purchases by private treaty from an auction purchaser of the rights of the original mortgagee is entitled to rely upon Art. 134. The auction purchaser of the rights of the mortgagee steps into the shoes of the mortgagee. Next it is contended that Art. 134 affords protection only to a person who purchases property from a mortgagee in the bona fide belief that he is purchasing an absolute proprietary title. The words "in good faith" which appeared in Art. 134, Lim. Act of 1871 were struck out of that article when Act 15 of 1877 was passed and do not appear in the present Limitation Act of 1908.

My view is that the words were advisedly struck out in order to put a stop to the instituting of inquiry into the knowledge or state of mind of a purchaser of the property. That was the view expressed by Tudball, J., in *Dal Singh v. Gur Prasad* (1), and it is said to have been repeated by him in an unreported decision by him in Second Appeal No. 547 of 1914. The case is referred to in a judgment of Piggott, J., but a wrong reference is given, the case actually referred to being a suit for restitution of conjugal rights. But it seems that this Court has in several cases either held or assumed that, notwithstanding the alteration in the language of Art. 134, the purchaser must show that he purchased in good faith. There seems to have been some difference of opinion on the subject in the Bombay High Court: see *Yesu Ramji Kalnath v. Balkrishna Lakshman* (2) and *Pandu v. Vithu* (3). Sitting as a single Judge I must follow the decisions of this Court and I there-

fore direct that the record of this case be returned to the lower appellate Court for finding on the question whether the predecessors in title of defendants 4-7 purchased the property now in their possession from Ghasi in the bona fide belief that they were acquiring an absolute interest in the property. Further evidence may be admitted. Ten days will be allowed for objections on return of the finding.

V B/R.K

Case remanded.

A. I. R. 1915 Allahabad 423

RICHARDS, C. J. AND TUDBALL, J.

Mahomed Mahbub Ali Khan—Plaintiff—Appellant.

v

Raghubar Dayal and others—Defendants—Respondents.

First Appeal No. 135 of 1913, Decided on 28th July 1915, from decree of Offg Sub-Judge Bijnan.

Pre-emption—Proof—Plaintiff has to prove not only custom creating right but also existence of right in him.

In a suit for pre-emption based upon custom it lies upon the plaintiff not merely to prove the existence of some custom of pre-emption but to prove the existence of a custom under which he himself has a right to pre-empt.

[P 124 C 1

Taj Bahadur Sapru and Ibn Ahmad—for Appellant.

Sungta Lal—for Respondents.

Judgment—This appeal arises out of a suit for pre-emption. The Court below has dismissed the claim. The plaintiff adduced as evidence of the existence of the custom, an extract from the *Wajibularz* of 1865. The Court below has considered the history of the village. It has also considered the terms of the *Wajibularz*. The language used in the *Wajibularz* coupled with the history of the village strongly suggests that what was recorded in the *Wajibularz* of 1865 was not an existing custom, but an arrangement between the cosharers. We are not prepared to dissent from the view taken by the Court below that a custom of pre-emption has not been proved in the present case. There is however another matter which we think is fatal to the plaintiff's claim. Since the *Wajibularz* of 1865 perfect partition has taken place in the village and the plaintiff was not at the time of the sale a cosharer with the vendor. His property was situate in a separate mahal. There was

(1) [1909] 12 O. C. 84=2 I. C. 250.

(2) [1891] 15 Bom. 583.

(3) [1895] 19 Bom. 140.

no joint and several responsibility between the plaintiff and the vendor for the payment of the Government revenue assessed upon their respective properties. Neither had any voice in the management or share in the enjoyment of the other's zamindari. It lay upon the plaintiff in the present case not merely to prove the existence of some custom of pre-emption, he had to prove the existence of a custom under which he himself had a right, that is to say, he had to prove the existence of a custom which gave a right to a person who was not a cosharer with the vendor. The great importance in pre-emption cases of the coparcenary relationship has been pointed out in the case of *Dalgagan Singh v. Kalka Singh* (1), and also in the case of *Ganga Singh v. Chedri Lal* (2).

The only evidence of the existence of a custom in the present case was the extract from the Wajibularz to which we have referred. But that record clearly relates to a right between cosharers because at that date partition had not taken place and all the proprietors in the village were cosharers with each other. We are not deciding that the custom (assuming that there was one) ceased as the result of partition. The custom continues, but the plaintiff, not being a cosharer with the vendor, is no longer within the custom. We think that the plaintiff gave no evidence of the existence of a custom which gave a person who was not a cosharer with the vendor a right of pre-emption. We dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1910] 22 All. 1=(1899) A. W. N. 111.

(2) [1911] 33 All. 60=12 L. C. 98.

A. I. R. 1915 Allahabad 424

TUDBALL and CHAMIER, JJ

Emperor

v

Mian Din and another—Accused.

Criminal Appeal No. 536 of 1915, Decided on 23rd July 1915, from order of acquittal by Cantonment Magistrate, Allahabad.

Public Gambling Act (3 of 1867), Ss 1 and 3—Enclosure of semi-circular low brick wall place.

Round the sides of a bullock-run, in the shape of a semi-circle there had been raised a low wall of loose-bricks and it was within the shelter of this low brick-wall that gambling took place:

Held that the enclosure was a place, within the meaning of the Gambling Act. [P 424 C 2]

A. R. Ryves—for the Crown.

R. K. Sorabji—for Accused.

Judgment.—This is a Government appeal against an order of acquittal passed by a Magistrate of the first class in the case of two persons Mian Din and Fariduddin who were charged with an offence under S. 3, Public Gambling Act, 3 of 1867. The Magistrate passed his order on the finding that the spot where the gambling was taking place was not a "place" within the meaning of S. 1 or S. 3 of the Act. In S. 1, a common gaming-house is defined as any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place etc. The spot where the gambling is said to have taken place in the present case, is the lower end of a bullock-run of a disused well on a bit of open land where there are some trees and a small hut. Round the sides of the bullock-run, in the shape of a semi-circle has been raised a low wall of loose-bricks and it is within the shelter of this low brick wall, that the gambling is said to have taken place. The Magistrate has passed his opinion that it is not a "place" within the meaning of the Act relying on ruling to be found as *Abbi v. Queen-Empress* (1) and on *Queen-Empress v. Jagannayakulu* (2). He refused to follow *Emperor v. Fattoo Mahomed Sher Mahomed* (3). In our opinion, the place where the gambling is said to have occurred in the present case, falls within the definition of the word "place" in the Act. The question was discussed with some detail in the judgment in *Emperor v. Fattoo Mahomed Sher Mahomed* (3). In the Bombay Act, the words are:

"Whoever, being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purpose of a common gaming-house"

The only difference between the Bombay Act and the Act which is in force in this Province is that the words "walled enclosure" are added in the latter. The section runs: "Having the use of any house, walled enclosure, room or place".

(1) [1896] 14 P. R. 1896 Cr.

(2) [1895] 18 Mad 46=1 Weir 919.

(3) [1913] 37 Bom. 651=20 L. C. 609.

The Bombay Judges in their judgment, refer to certain English cases in which a decision was given in regard to the meaning of the word "place" in Ss. 1, 2 and 3 English Betting Act which prohibit the use for betting of any house, office, room or other place. We agree with them that there is no reason to suppose that the word "place" in either of the two Indian Statutes has any more narrow or restricted meaning than it has in the English Statute. In *Powell v. Kempton Park Racecourse Company* (4), Lord Halsbury remarked as follows.

"I think in this respect with Rigby, L. J. that any place which is sufficiently definite, and in which a betting establishment might be conducted, would satisfy the words of the Statute."

Lord James of Hereford remarked:

"There must be a defined area so marked out that it can be found and recognised as the 'place' where the business is carried on and wherein the bettor can be found."

In the Bombay case, the place which was under consideration, was a piece of open land on which there was neither roof nor wall but which was surrounded by houses and was approached by a narrow lane. In our opinion, in the case which is now before us, the spot where the gambling is said to have taken place, was a sufficiently defined area so marked out that it could be found and recognised as the place where the business of betting was being carried on. The argument has been raised that the adjective "walled" in Act 3 of 1867 applies not only to the noun 'enclosure' but also to the two nouns 'room or place'. With this, we cannot agree. It is clear that the word "walled" is applied only to the word "enclosure." It could hardly in common parlance be used with the word "room." We therefore are of opinion that the decision of the Magistrate in so far as the meaning of the word "place," is concerned is incorrect, and we must therefore set aside the order of acquittal. At the same time, the case is one of a very trivial nature. The accused have been subjected practically to two trials, one in the Court below, and one in this Court, and we think that the ends of justice have been sufficiently met. We, therefore do not direct that the accused be again placed upon their trial.

V.B./R.K. *Order set aside.*

(4) [1899] A. C. 143=68 L. J. Q. B. 392=80 L. T. 538=17 W. R. 585=63 J. P. 260=19 Cox. C. C. 365=15 T. L. R. 266.

A. I. R. 1915 Allahabad 425

RICHARDS, C. J. AND BANERJI, J.

Dirgpal Singh and another - Defendants—Appellants.

v.

Kallu and others—Plaintiffs—Respondents.

Second Appeal No. 572 of 1914, Decided on 21st July 1915, from decree of Dist. Judge, Aligarh.

Limitation Act (9 of 1908), Art. 134.—Purchaser with knowledge of his vendor's title as mortgagee only is not protected by Art. 134.

The omission of the words "in good faith" from Art. 134, Lim. Act, 1908 does not entitle a person who purchases with full knowledge that his vendor's title is merely that of a mortgagee, to the benefit of that article. [P 426 C 1]

M. L. Agarwala—for Appellants.

Gulzar Lal—for Respondents.

Judgment—This appeal arises out of a suit to redeem a mortgage made in the year 1843. The facts are a little complicated, but it is unnecessary to state them in detail for the purpose of deciding the present appeal. It appears that in the years 1878 and 1879 persons in whom the mortgagee rights were then vested made transfers in favour of certain persons who are now represented by the appellants. In these transfers words are used descriptive of the interest transferred which would be appropriate if the transferor was absolute owner and not merely mortgagee. On the other hand the words are not altogether inappropriate as descriptive of the right of a mortgagee in possession. The lower appellate Court has found in concurrence with the Court of first instance that the actual interest which the transferors had at the date of the transfers was that of mortgagees in possession. It has also found (and given good reasons for its findings) that the transferees knew what the interest of the transferors was. After the transfer the name of the transferee was entered in the revenue papers as owner of the "mortgagee" interest. It is contended here that notwithstanding the findings of the Court below Art. 134 Lim. Act, bars the suit. Art. 134 is as follows.

"To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration."

The period is twelve years from the date of the transfer.

It is admitted that a mortgagor has sixty years within which to bring a suit for redemption. It is also admitted that where the mortgagee transfers his mortgage rights as such, the transferee stands in no better position than the transferor. It is however urged that if the words used in the deed of transfer are applicable to the transfer of an absolute interest then Art. 134 applies, no matter whether the transferee was aware of the nature of the interest of the transferor or not. We find great difficulty in accepting this contention. The main argument in favour of it is based on a comparison between the words of Art. 134 in the recent Limitation Acts and Art. 134 in Act 9 of 1871. In that Act the article was as follows:

"To recover possession of immovable property conveyed in trust or mortgaged and afterwards purchased from the trustee or mortgagee in good faith and for value."

It is said that the absence of the words "in good faith" in the recent Acts shows the knowledge of the nature of the transferor's title is quite immaterial. Reliance is placed upon the case of *Yesu Ramji Kalanath v. Balkrishna Lakshman* (1). This case seems to have been considered in a later judgment of the same Court in the case of *Pandu v. Vithu* (2). We think that there is no reason for holding that the omission of the words "in good faith" from the recent Act entitled the person who purchased with full knowledge that his vendor's title was merely that of mortgagee to the benefit of Art. 134. It may have been that the words were considered not altogether appropriate and that their retention would throw the onus on the transferee of proving that he had no knowledge of his vendor's title. This would be in many cases a hardship upon the person in possession of the property—he would have to prove a negative possibly after the lapse of many years. Whatever may be the reason for omitting the words we cannot think that the legislature intended that the mortgagee and his transferee should be able to shorten the period allowed by law for redeeming a mortgage by wilfully, and to the knowledge of both, misdescribing the interest transferred in the deed of transfer. In our opinion, having regard to the findings of the Court below that the transferees

from the mortgagees had actual knowledge that their vendors' title was merely that of a mortgagee and that they had no belief that they were purchasing an absolute interest, the decision of the Court below should be affirmed.

The only other point is a question of calculation. This is a matter which was not brought to the notice of the lower appellate Court and we do not think it can be entertained here.

The result is that the appeal fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 426

KNOX, J.

Bhaguna and another—Defendants—
Appellants

v.

Bhagwan Das and others—Plaintiffs—
Respondents.

Second Appeal No. 1342 of 1914, Decided on 16th July 1915, from decree of Dist. Judge, Meerut.

Agra Tenancy Act (2 of 1901), S. 10 (12)—Usufructuary mortgage of *sir* executed before the Act does not make zamindar exproprietary tenant — Ejectment of zamindar does not help ejectment of mortgagee.

In 1896 a zamindar executed a usufructuary mortgage of a portion of his zamindari including *sir*. In 1907 the zamindari was sold at auction. The auction purchaser got the zamindar ejected from his exproprietary right and then brought another suit to eject the mortgagee.

Held that the mortgagee could not be ejected inasmuch as the mortgage having been made prior to the passing of Act 2 of 1901, the zamindar had not become an exproprietary tenant by virtue of his mortgage. [P 427 C 2]

Surendra Nath Sen—for Appellants

Gokul Prasad—for Respondents.

Judgment.—In the year 1896 one Kure was the proprietor of a certain share in Mauza Lohari, Pargana Kutana. Out of that share he mortgaged a portion, consisting of a little over a bigha to the appellants. The mortgage was a usufructuary mortgage and Kure put the appellants in possession of the plots now in dispute. In the year 1907 a portion of Kure's property, covering an area of eight bighas eleven hiswas was put up to auction in execution of a civil Court decree and sold. The purchasers at auction were the respondents in the present case. The purchasers went to the revenue Court and got mutation of names in their favour. They further had a rent of Rs. 44-14-2 fixed on the

(1) [1891] 15 Bom. 583.

(2) [1895] 19 Bom. 140.

expropriatory holding of Kure. In the year 1912 the auction purchasers proceeded further and obtained the ejectment of Kure from his entire expropriatory holding. Having done this they next proceeded to sue for the ejectment of the present appellants, Bhagwana and Dewana, from the two plots, Nos. 2570 and 2571. These two plots are included in the area of eight bighas eleven biswas from which Kure had been ejected.

The appellants in their written statement raised the point that they were mortgagee cosharers and were in possession as such and that the plots in dispute were their khudkasht. The Court of first instance accepted this plea and dismissed the suit. Thereupon the respondents, Bhagwan Das and others, appealed. The lower appellate Court held that the question for determination in the appeal was whether the respondents to this appeal were entitled to have the appellants ejected. The lower appellate Court, holding that when Kure was ejected from the plots the appellants were merely trespassers, went on to hold that the plaintiffs were clearly entitled to have the defendants ejected. It accordingly allowed the appeal and decreed the plaintiffs' suit with full costs throughout. Two pleas were taken in the memorandum of appeal which the defendants have filed in this Court. Great stress is laid upon the first plea, viz., that the plaintiffs, here respondents, were not competent to eject the defendants, here appellants, in enforcement of the decree against Kure. I think no doubt can exist upon this point. Indeed it is admitted by the other side that when the mortgage in 1896 was first entered into between the parties, Kure was then zamindar and he did execute a usufructuary mortgage over the two numbers in suit and put the mortgagees in possession.

In 1896 and the year following this Court held that a zamindar who makes a usufructuary mortgage of his zamindari including his *sir* land does not so lose or part with his proprietary rights

"within the meaning of S. 7, Act 12 of 1881, as to become an expropriatory tenant of his *sir* land."

This was held in the case of *Madho Bharthi v. Barta Singh* (1), by all the Judges of this Court sitting in Full Bench.

(1) [1894] 16 All. 337=(1894) A. W. N. 110.

From 1896 onward then Kure continued to be the proprietor over the land in dispute and was not an expropriatory tenant only. In the year 1901, the N. W. P. Tenancy Act was passed and that Act (S. 10, Cl. 12) has enacted that a usufructuary mortgage shall be deemed to be a transfer within the meaning of that section. Whatever effect that may have had upon the position of Kure it is not necessary to determine, but the passing of that Act could not affect the right which had been created in favour of the appellants prior to the passing of that Act. S. 6, Local General Clauses Act, Cl. (c), expressly lays down that where an Act of the United Provinces legislature repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. No such intention has been pointed out to me nor do I know of any.

On behalf however of the respondents my attention has been called to the case of *Sham Das v. Batul Bibi* (2). In that case it was undoubtedly held that a zamindar having mortgaged by way of usufructuary mortgage his zamindari together with his *sir* land lost his zamindari rights and became an expropriatory tenant of his *sir*. There is one difference between that case and the present. In *Sham Das v. Batul Bibi* (2) the mortgagor parted with the whole of his rights in the property held by him and it was in pursuance of the mortgage, the mortgagee obtained a decree for sale, sold that property in execution of the decree and purchased it and obtained possession. I do not think that that case is a safe precedent to follow in the present case and even if it applies, then the only difference is that the mortgagee rights of the appellants must be held to attach to the expropriatory rights which Kure held when the sale took place. The learned Judge of the Court below and the vakil of the respondents lay some stress upon the fact that the sale of the expropriatory rights was not subject to any incumbrance in favour of one Samrat, but the present appellants were no parties to that decree and it does not appear that they were ever sent for and asked as to how the property should be sold.

(2) [1902] 24 All. 538=(1902) A. W. N. 17.

I allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance.

v.B/R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 428 (1)

RICHARDS, C J.

Prag Das Bhargava and another—Accused—Applicants.

v.

Daulat Ram—Opposite Party.

Criminal Revn. Appln. No. 787 of 1915, Decided on 27th September 1915, from order of Joint Magistrate, Agra.

Criminal P. C (5 of 1898), Ss. 177 and 179—Deception discovered at different place—Magistrate of place of deception discovered has no jurisdiction—"Consequence ensued" explained—Penal Code (45 of 1868), Ss. 420 and 265.

The complainant was induced to part with his money at Meerut on the false representation that a certain barrel contained a certain amount of spirit. At Agra it was discovered that the barrel did not contain the amount of spirit that it had been represented to contain.

Held, that the Magistrate at Agra had no jurisdiction to try the accused under Ss. 420 and 265, Penal Code, inasmuch as the discovery of the alleged fraud at Agra after the goods were delivered, could not be said to be a "consequence which has ensued" within the meaning of S. 179, Criminal P. C. [P 428 C 2]

*Peary Lal Banerji—*for Applicants.

*A. H. C. Hamilton—*for Opposite Party.

Judgment.—Prag Das Bargava and Kundan Lal have been charged with offences under Ss. 420 and 265, I. P. C. It is alleged that the complainant was cheated, that is to say, that he was induced to part with his money at Meerut on his false representation that a certain barrel contained a certain amount of spirits. When the barrel reached Agra, it is alleged that it was discovered that the barrel did not contain the amount of spirit that it had been represented to contain. The charge under S. 265 is that the accused used a wrong measure. Undoubtedly if a wrong measure was used it was used in Meerut. The applicants complain that the Magistrate in Agra had no jurisdiction to enquire into the case. S. 177, Criminal P. C. provides that every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed. In my opinion, the alleged offences, if committed, were committed in Meerut and not at Agra and therefore prima facie S. 177 applies. S. 179 is as follows:

"When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be enquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

There are several illustrations given to the section. The first is:

"A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of culpable homicide of A may be enquired into or tried either by X or Z."

I think it is quite clear that S. 179 does not apply to the circumstances of the present case. The accused are not charged with the commission of any offence

"by reason of anything which has been done or any consequence which has ensued at Meerut."

The discovery of the alleged fraud at Agra after the goods were delivered, cannot be said to be a "consequence which has ensued" within the meaning of this section. I am quite satisfied that the Magistrate at Agra has no jurisdiction. The learned Magistrate may be informed of this judgment.

v.B./R.K.

Application granted.

A. I. R. 1915 Allahabad 428 (2)

CHAMIER, J.

Chand Mal—Plaintiff—Appellant.

v.

Saryu and others—Defendants—Respondents.

Second Appeal No 1052 of 1914, Decided on 8th July 1915 from decree of Dist. Judge, Benares, D/- 24th April 1914.

Agra Tenancy Act (2 of 1901), S. 21—Mortgage with possession of occupancy after the Act—Subsequent relinquishment by occupancy makes mortgagee mere tenant liable to be ejected.

In September 1901 an occupancy-tenant mortgaged his holding with possession. The zamindar accepted rent from the mortgagee. In 1911 the occupancy tenant relinquished his holding.

Held, that the occupancy having come to an end, the mortgagee was neither an occupancy-tenant nor a mortgagee but a mere tenant of the zamindar and liable to be ejected.

[P 429 C 1]

*Gokul Prasad—*for Appellant.

*Kalindi Prasad—*for Respondents.

Judgment.—In this case the tenant of an occupancy holding executed a mortgage in favour of the defendants in September 1901, that is, after the passing of the present Tenancy Act. The mortgage was therefore invalid. The plaintiff, who is the zamindar, might have

taken action under S. 31, Tenancy Act, but he did not do so. He accepted rent from the so-called mortgagees for several years and he has now brought this suit to have them ejected from the holding. Meanwhile in 1911, the occupancy tenant relinquished his holding. According to the decisions of this Court the occupancy tenancy has come to an end. The defendants are certainly not occupancy tenants and it appears to me that they cannot call themselves mortgagees. In the events which have happened, it appears to me that the defendants are the tenants of the plaintiff and may be ejected by him. I was referred to two cases supposed to bear more or less on the present case, namely, *Ram Sarup v. Kishan Lal* (1) and *Brij Kumar Lal v. Sheo Kumar Missir* (2). Neither of these cases applies to the present case. The latter had to do with a mortgage made before the passing of the present Tenancy Act. In my opinion the decision of the Court of first instance was correct and should not have been disturbed. I allow this appeal, set aside the decree of the District Judge and restore the decree of the Court of first instance with costs here and in the lower appellate Court.

V.B./R.K.

Appeal allowed.

- (1) [1907] 29 A.H. 327=4 A. L. J. 306=(1907) A.W.N. 76.
 (2) [1915] 29 I. C. 215.

A. I. R. 1915 Allahabad 429

RAFIQUE, J.

Natha Mal—Defendant—Appellant.

v.

Roshan Lall and others—Plaintiffs—Respondents.

Second Appeal No. 1378 of 1914, Decided on 20th July 1915, from decision of Addl. Dist. Judge, Aligarh, D/- 29th July 1914.

Agra Tenancy Act (2 of 1901), S. 202—S. 202 applies only to holdings and not to groves.

Section 202, Agra Tenancy Act 2 of 1901, applies only to agricultural holdings and not to groves. [P 429 C 2]

P. L. Banerji—for Appellant.

Lakshmi Narayan and Jang Bahadur Lal—for Respondents.

Judgment.—The defendant-appellant was the owner of half the khewat No. 2. In execution of a decree against him his share was sold and purchased by the plaintiffs respondents on 20th March 1908.

In the sale certificate the description of the property sold is given which includes a beri grove. On 8th April 1914, the plaintiffs-respondents brought the suit, out of which this appeal has arisen, for a declaration that they were the owners and proprietors of the beri grove situate on plot No. 380 and for an injunction against the defendant-appellant restraining him from interfering with their possession. They said that the defendant-appellant a short time before the institution of the suit had without any right wrongfully cut down two trees of the grove in question. They asked for Rs 30 as damages for the price of the trees cut down by the defendant-appellant. The latter resisted the suit by denying the title of the plaintiffs-respondents to the grove. He said that it was excepted from the sale and that it was his *sir*. The learned Munsif decreed the claim. On appeal his decree was confirmed. The defendant-appellant comes here in second appeal and contends that as he raised the question of exproprietary tenancy in respect of plot No. 380, on which the grove is situate, the Courts below were not competent to dispose of that question under S. 202, Act 2 of 1901. On reference to the record it appears to me that no specific plea was taken by the defendant-appellant to the effect that after the sale of his zamindari share he became an exproprietary tenant of the plot on which the grove is situate. He did say that the said plot was his *sir*, and in connexion with that statement the first Court discussed the question whether he was an exproprietary tenant of that plot. It came to the conclusion on the evidence in the case that even if the defendant-appellant was an exproprietary tenant of that plot, he had lost his right by his having been out of possession for more than six months. The same view was taken by the learned Judge on appeal. It cannot be said on the pleadings in the case that the question now raised was agitated in the Courts below. But apart from that I do not think that the provisions of S. 202, Act 2 of 1901, are applicable to

the present case. The plot in suit, that is No. 380, on which the grove is situate, is not an agricultural holding and the provisions of S. 202, Act 2 of 1901 apply only to agricultural holdings. The objection of the appellant to the decree passed against him therefore fails and the appeal is dismissed with costs including fees on the higher scale.

VERDICT *Appeal dismissed.*

A. I. R. 1915 Allahabad 430

RICHARDS, G. J. AND RAFIQUE, J.

Emperor

v.

Brikhbhan Singh and others—Accused.

Criminal Appeal No. 459 of 1915, Decided on 13th July 1915, from order of Assistant Sess. Judge, Mainpuri, D/- 19th April 1915.

(a) Criminal P. C. (5 of 1898), S. 165—Written authority must be specific of things to be searched.

Where a police officer authorizes another to make a search without a warrant from a Magistrate, he should give the authority in writing specifying the thing or things which are to be searched for. S. 165, Criminal P. C., does not authorize a general search on the chance that something may be found.

[P 431 C 2]

(b) Penal Code (45 of 1860), S. 332—Resistance to illegal search is not offence.

An accused offering resistance to the police making an illegal search is not guilty of an offence under S. 332, I. P. C. [P 432 C 1]

A. E. Ryves—for the Crown.

G. W. Dillon and Sheodehal Sinha—Accused.

Judgment—Eighteen accused persons were put on their trial on charges of rioting, dacoity, wrongful restraint and obstructing the police in discharging their duty. The learned additional Sessions Judge acquitted the accused and Government have appealed. It appears that a dacoity had taken place at a place called Nagla Murli in the Agra District. Some sort of a conference had taken place at which the Deputy Inspector of Police was present. The persons attending this meeting, appear to have been the Circle Inspectors of the Agra

District and the surrounding districts. It was there decided that searches should take place at the houses of persons who were suspected of having been concerned in the dacoity. The result of this meeting was that Chunni Singh, one of the Circle Inspectors of the Mainpuri District sent Mohammad Naim Khan, a Sub-Inspector of Jasrana (in the Mainpuri District) to Mahfuz Ali, one of the Circle Inspectors of the Agra District, in whose circle the dacoity is said to have taken place. Mahfuz Ali says that he gave a written authority to Naim Khan to search the house of one Nihal Singh and arrest him. In cross-examination, he stated:

"I wrote this, that the house of Nihal Singh be searched in connexion with the dacoity at Nagla Murli, that he might be arrested for the sake of identification and that the houses of those persons should also be searched who were suspected by the Sub-Inspector of receiving stolen property."

It may be noted here that Mohammad Naim Khan had nothing to do with the investigation of the dacoity which had taken place at Nagla Murli. It was outside his district, and, so far as the evidence goes, there is nothing to show that Mohammad Naim Khan even knew what property had been stolen in the dacoity. It is here desirable to mention who Nihal Singh was. Nihal Singh was not a resident of the Mainpuri District. He had belonged to the Agra District. Proceedings had been taken against him in the year 1912 under S. 110, Criminal P. C. He had been bound over and his father in law, Bindrabhan Singh, accused 2, had gone security for him. Whether it was that Bindrabhan Singh having gone security for his son-in-law, wished to keep an eye upon him, or whether he was anxious that no false accusation might be made against him, the fact remains that Nihal Singh had gone to reside with his father-in-law in the village of Malikpur in the Mainpuri District. It would appear that on 4th December 1914 a search had been made at the house of Bindrabhan Singh. How far this search was legal we are not in a position to say, but the search was not in connexion with anything wrong that Bindrabhan had done. The search must have been in some way connected with Nihal Singh. On 20th December, that is to

say, 16 days afterwards, Mohammad Naim Khan with two constables, Sunder Singh and Debi Singh arrived at the house of Bindrabhan Singh between 10 and 11 a. m. He was met in the village by Hakim Singh and Naubat Singh (brother of Hakim Singh), Hakim Singh being the mukhia of the village, though he lived in a neighbouring village. According to the police, when they arrived at the house, Nihal Singh at once came out and said:

"You have searched the house shortly before and how you are going to search it again.

He asked them to fight it out before they searched the house. Immediately a number of other persons arrived; they began to beat the Sub Inspector and the constables. The Sub-Inspector fired three shots from a revolver in self defence; the revolver was snatched away and the police were badly beaten. They were put into a cell, shut up, their uniforms and turbans taken from them, and they were only released after some persons belonging to a neighbouring village came to their rescue. This is the story told by the police.

A number of the accused persons admitted that they had assaulted the police. That the police were assaulted and beaten there is not the least doubt. But the story of the accused (at least of those who admit having taken any part in the affair) is that the police arrived whilst all the male members of the house were still at work in the fields, and forced their way into the presence of the women where they asked for Nihal Singh; that they abused the women; that the women raised an outcry which brought Chotey Singh; a young Thakur, aged about 24 years a son of Brikhbhan Singh and brother-in-law of Nihal Singh, to the house, he remonstrated with and abused the police, and that thereupon the Sub-Inspector deliberately fired at him. Chotey Singh admits that he was stooping to pick up a lathi when he was fired upon by the Sub-Inspector. The accused then say that they took away the revolver from the Police Inspector to prevent his shooting other persons, and that it was necessary to do so. They admit that they used lathis but say that they only did so after Chotey Singh had been shot down.

The first matter that requires some consideration is how far the visit of the police to the house of Brikhbhan Singh was legal. It is obvious that the main object of the visit was to search the house. It may even be doubted whether there was ever the least intention of arresting Nihal Singh, except perhaps in the event of suspicious property being found in the house. A search without a warrant from a Magistrate can only be made under the provisions of S. 165, Criminal P. C. That section provides as follows:

"Whenever an officer in charge of a police station, or a police officer making an investigation, considers that the production of any document or thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate and there is reason to believe that a person to whom a summons or order under S. 94 has been or might be issued, will not or would not produce such document or thing according to the directions of the summons or order or when such document or thing is not known to be in the possession of any person, such officer may search, or cause search to be made for the same, in any place within the limits of the station of which he is in charge, or to which he is attached."

Clause 2.—"Such officer shall, if practicable, conduct the search in person."

Clause 3.—"If he is unable to conduct the search in person, and there is no other person competent to make the search, present at the time he may require any officer subordinate to him to make the search and he shall deliver to such subordinate officer, an order in writing, specifying the document or thing for which search is to be made, and the place to be searched; and such subordinate officer may thereupon search for such thing in such place."

We may assume (but only for the purposes of argument) that Mahfuz Ali could have authorized Naim Khan to make the search without a warrant from a Magistrate. But even on this assumption, it was necessary when Mahfuz Ali was not making the search himself that he should have delivered in writing to Naim Khan an order specifying the thing for things which were to be searched for. The section does not authorize a general search on the chance that something may be found. There is no evidence that any such specification was ever given. So far as the evidence goes there was no such specification. We have nothing to show that Naim Khan knew what he was to search for. It seems very much as if the intention was to do the very thing we have said the

section does not authorize. It lay on the prosecution to show that the action of the police was legal and on the evidence we find great difficulty in holding that Naim Khan was duly authorized to search the house of Bindrabhan Singh.

It is contended that while there may have been no legal authority for the search, there was nevertheless authority to arrest Nihal Singh. Arrest without warrant is provided for by S. 54, Criminal P. C. The first part of Cl. (1) is as follows:

"Any police officer may, without an order from a Magistrate and without a warrant, arrest, first any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists, of his having been so concerned."

Mahfuz Ali does not say that Nihal Singh had been concerned in the Nagla Murli dacoity, nor does he say that any complaint had been made that he had been concerned in it, or that any information to that effect had been received or that there was a reasonable suspicion of his having done so. He says in his evidence that the object of the arrest was identification. This presumably means that after his arrest, he was to be paraded for the purpose of being identified. It further appears extremely doubtful whether Mahfuz Ali Khan could himself have arrested Nihal Singh. He was a Circle Inspector of the Agra District. It is said that Naim Khan, could have arrested Nihal Singh himself. Naim Khan could only have arrested Nihal Singh without a warrant under S. 54. It is not even pretended that he was acting under the authority of this section. His authority to arrest (if any) was under the document which he had received from Mahfuz Ali. It would seem therefore that neither the search of the house nor the alleged arrest of Nihal Singh was legal. The charge under S. 332, I. P. C., therefore, falls to the ground.

On the general merits of the case, there is we fear, some reason to suspect the entire bona fides of the police. We wish to say as little as possible, because the police, of course, are not on their trial. It is necessary however where it is sought to set aside an acquittal, to consider the evidence and surrounding

circumstances with the greatest care. It seems to us that if an application had been made to the Court either for a warrant for the arrest of Nihal Singh, or for an order for the search of the house, the Court would have hesitated to make that order if it had been informed that the house was not the house of Nihal Singh and that a search had already taken place there shortly before. The dacoity had taken place prior to the first search. A second search should not have been made without very good cause. In the first account which Muhammad Naim Khan gave of the occurrence, he said that it was a lathi blow struck by one of the accused which caused his revolver to go off accidentally. This was a deliberate untruth. The nature of the wound and other circumstances of the case including Naim Khan's own evidence at the trial, shows that his revolver did not go off by accident, but was fired off on purpose, and there is very strong ground for believing that he fired at Chotey deliberately. This untrue statement in his first report shows that the Sub-Inspector was not quite happy about the revolver shot. He mentions in his report a large number of persons who were present, at the time of the occurrence. Amongst other persons he mentioned as being present, was Sukha, the chowkidar and Gulzari Lal, the patwari. Gulzari Lal was in the first place not charged with having taken part in the assault upon the police. If Gulzari Lal did what Naim Khan, Sundar and Debi Singh said he did, he would have been one of the chief persons to blame for the assault on the police. If he acted in the way that Hukam Singh and other prosecution witnesses allege, he was undoubtedly mainly responsible for every thing that occurred. Naim Khan in his evidence says that at the very commencement of the row Gulzari Lal said that

"there was a day when Nihal Singh had left the village with a "moror" on his head and that he was about to be taken away under arrest in the presence of the Thakurs. On this, all the persons named above, began to beat me and the constables. Being afraid of losing our lives, I took out my pistol and fired three times."

This is not what the witness said when he made his first report. Sunder Singh says that Gulzari Lal said to the darogha :

"there was a day when Nihal Singh came into the village with a wedding crown on his head and there was a day when he would be led away as a prisoner in the presence of the Thakurs. Debi Singh deposes to the same effect. Hukam Singh says that Gulzar Lal "gave provocation" and said that there was a time when Nihal Singh had come to the village with a wedding crown on his head. It is possible that in the lifetime of the Thakurs of the village, he should go away as a prisoner. On this, the persons who were on the chabutra came down and surrounded the darogha. The lathis began to be wielded on the darogha and the constables."

It is not very probable that the patwari would have said anything of the kind or taken the part attributed to him even if his sympathies were more or less with the villagers. We find however that the police themselves evidently did not believe the case against Gulzar Lal, because we find that Mr. Kemp, Superintendent of Police, at quite an early stage took steps to withdraw the case against Gulzar Lal as being weak and the evidence unconvincing. If Mr. Kemp's estimate of the evidence was correct. Muhammad Naim Khan, the two Sub-Inspectors, and Hukam Singh have all told a deliberate untruth and falsely accused Gulzar Lal.

There is some justification for the suggestion that Gulzar Lal was implicated because he would not support the police story. There is another matter which is certainly far from satisfactory when considering the bona fides of the police. Shortly before the trial Naim Khan summoned a number of persons belonging to the village, including persons who were defence witnesses and held out a threat to them that if they harboured any of the accused, they would be liable to punishment. Considering the circumstances of the case, we doubt whether this warning was necessary in the interest of justice, and it certainly had a tendency to frighten the witnesses who would be called for the defence. It does not seem as if there was any need for the threat, for a police guard of 10 or 12 men had been placed in the village. There is yet another circumstance which deserves some consideration. It appears that immediately after the occurrence, the accused or some one for them sent a telegram to the Collector. This seems to suggest that the accused at that time looked upon themselves as aggrieved persons and were appealing to the authorities. If the ac-

cused had done what the police say they did, it is rather difficult to understand why it was they so to speak, took the Sub-Inspector and his two constables into custody. We are quite satisfied that when the witness Daryai Singh and certain other persons came to Malikpur after the fight was over, there was not the smallest attempt on the part of the villagers to conceal where the police were. The evidence of Daryai on this point we believe to be true and the evidence of Baldeo we believe to be false. The Sub Inspector and his two constables were given up at once; they were given milk and water to drink and proceeded upon their way in Gajadhar's cart.

It is contended that even on the assumption that there was no legal justification for a search or for the arrest, nevertheless, the accused were guilty of the other charges namely, under Ss. 147, 395 and 342, I. P. C., because they had no right of self-defence, having regard to the provisions of S. 99, I. P. C. This argument might have some force if we could think that the police had, even after the mistake, honestly come forward and told us exactly what had happened. We have pointed out that there are substantial reasons for thinking that the account given by the accused is more probable than the account given by the police. If we assume it possible that the police had really made their way into the female apartment in the absence of the male members, and that the moment Chotey arrived, they shot him down, we could hardly say that the accused could be held guilty for what subsequently occurred, or that the police could claim protection under S. 99. There is no doubt that the police were beaten and that lathis were used; at the same time, none of the injuries were of a very serious nature—no bones were broken. We also fear that there is reason to think that a number of persons who took no part in the occurrence and who were at worst only onlookers, were implicated; for example, Pokhpal Singh who is apparently quite blind of one eye and almost blind of the other. He cannot walk without the support of a stick. With the exception of Daryai Singh, there is not one of the prosecution witnesses, we can trust. Hakim Singh we consider quite unworthy of belief. He implicates Gulzar Lal whom he did not implicate

in his first report. According to the police, he went away when the row began and yet he pretends to give evidence as to what occurred right up to the end of the row.

It is alleged that the accused stole the uniforms of the police. This is a matter which is surrounded with mystery. From the very first the principal accused never pretended that they did not know that it was the police who had come to the house. What object the accused would have in stealing the uniforms of the police, it is difficult to understand. It is quite clear that they did not want to keep possession of the uniforms; it would have been most dangerous for them to do so. They would not have kept them for the purpose of concealing the marks of blood, because the injuries done to the police were perfectly apparent on their bodies. It is just possible that they might have kept the uniforms thinking Chotey had been killed and wishing to retain them as evidence of the identity of the persons who were responsible for his death. Under the circumstances, and having regard to the evidence on the record, we feel by no means certain that the police were wearing their uniforms on the day in question. It is however impossible for us to be certain one way or the other upon this point.

The judgment of the learned Sessions Judge has been criticized but we are very far from thinking that he did not arrive at a very fair estimate of the truth of the case. After carefully considering the evidence, we have come to the conclusion that there is no reason for interfering with the judgment of the Court below. We accordingly dismiss the appeal. We direct that those of the accused who are in custody shall be released at once and the warrants against those who are said to have absconded are cancelled.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 434

CHAMIER AND PIGGOTT, JJ.

Damodar Das and others—Judgment-debtors—Appellants.

v.

Birj Lal—Decree-holder—Respondent.

Execution First Appeal No. 135 of 1914, Decided on 27th May 1915, from decree of Sub-Judge, Bareilly.

Civil P. C. (5 of 1908), O. 45, R. 15—Execution includes restitution also—Printed copy of judgment will not suffice—Proof of order is necessary.

The words "execution" in O. 45, R. 15, Civil P. C., is intended to cover execution of any kind, that is to say, it covers the case of restitution as well as the case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council and a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply, in the first instance, to the Court indicated by R. 15.

No action can be taken only on the printed copy of a judgment of their Lordships of the Privy Council without proof that an order in Council has followed thereon. [P 435 C 2]

M. L. Agarwala—for Appellants.

Satish Chandra Banerji and *A. E. Ryves*—for Respondent.

Judgment.—This appeal and the connected Appeals Nos. 246, 263, 264 and 359 of 1914 arise out of proceedings taken by *Birj Lal*, one of the parties to the case of *Birj Lal v. Mt. Inda Kunwar* (1), in connexion with the order of His Majesty in Council in that case. As the report shows there were two suits of which one (No. 62 of 1907) was brought by *Inda Kuar* for possession of a 10 biswas share in a village and the other (No. 637) of 190 was brought by *Het Ram* and others for possession of the other 10 biswas share in the village. The Court of first instance in Suit No. 62 gave *Inda Kuar* a decree for a 2 biswas share on certain terms and dismissed her claim for the remaining 8 biswas. Suit No. 63 was dismissed by the Subordinate Judge. On appeal this Court passed decrees in favour of the plaintiffs in both suits. *Birj Lal*, a defendant in both suits, appealed to His Majesty in Council. The two appeals

(1) A. I. R. 1914 P. C. 38=36 All. 167=28. I.C. 715.

were consolidated in an order by His Majesty in Council dated 9th February 1914.

On 13th March 1914 Birj Lal presented an application to the Court of first instance in Suit No. 62, praying that he might be restored to possession of the 10 biswas share pending the taking of certain accounts ordered by their Lordships of the Privy Council. In the same suit he presented two applications for repayment of costs which had been recovered from him by Inda Kuar and a third application, the nature of which need not be specified. In Suit No. 63 Birj Lal applied to the Subordinate Judge to restore him to the possession of the 10 biswas share, inasmuch as the suit of Het Ram and others had been dismissed by their Lordships of the Privy Council. Birj Lal presented with his application a printed copy of the judgment of their Lordships of the Privy Council containing their recommendation in the usual form as to the order which should be passed in the case. But he did not file any copy at all of the order in council. His opponents at once objected that he was not entitled to apply to the Subordinate Judge without first presenting an application to this Court under O. 45, R. 15, Civil P. C., and they professed complete ignorance of the terms of the order of their Lordships of the Privy Council. They pleaded that the printed copy produced by Birj Lal could not be admitted in evidence and, even if admitted could afford no justification for disturbing their possession. The Subordinate Judge threw out all their objections. Hence these appeals.

Order 45, R. 15, provides that whoever desires to obtain execution of any order of His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred, and such Court is required to transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same.

It is contended, first, that O. 45, R. 15, does not apply at all to the case of a person who is entitled to restitution of the kind described in S. 114 of the Code, and, secondly that even if a person entitled to such restitution may make an application under O. 45, R. 15, he is not obliged to do so and he may go direct to the Court of first instance under S. 144.

We are unable to accept either of these contentions. It appears to us that in the absence of O. 45, R. 15, there would be nothing to show what Court in India is to carry out an order of His Majesty in Council. We think that the word "execution" in O. 45, R. 15, is intended to cover execution of any kind, that is to say, that it covers the case of restitution as well as the case of enforcement of a decree for possession or the like passed for the first time in the case on an appeal to His Majesty in Council, and that a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply, in the first instance, to the Court indicated by R. 15.

In the present case that was this Court. Further, we are of opinion that the Subordinate Judge was not entitled to take any action on the printed copy of the judgment of their Lordships of the Privy Council without proof that an order in Council had followed thereon; for what has to be enforced or executed is not the judgment or recommendation of their Lordships but the order in council. The result is that Appeals Nos. 135, 263 and 264 are allowed and Birj Lal's applications are dismissed with costs in both Courts. Appeals Nos. 246 and 359 are dismissed with costs.

We have been informed that, since the disposal of the applications referred to above by the Subordinate Judge, an application was made by Inda Kuar to this Court under O. 45, R. 15, Civil P. C., and on her application the order of His Majesty in Council has been transmitted to the Court of the Subordinate Judge in order that it may be executed. We may point out that, as the order in council has now reached the Court of the Subordinate Judge, it is open to all parties to these suits to apply to the Subordinate Judge for such relief as they may be entitled to without making any further

application to this Court under O. 45, R. 15, Civil P. C.

V.B./R.K.

Appeal decreed.

A. I. R. 1915 Allahabad 436

BANERJI AND TUDBALL, JJ.

Khetra Pal—Defendant—Appellant.

v.

Mt. Mumtaz Begam & another—Respds.

First Appeal No. 353 of 1913, Decided on 22nd November 1913.

Civil P. C. (5 of 1908), O. 21, R. 63—Declaratory suit valued much more than the amount of decree in which property attached—Proper valuation is amount of decree.

The plaintiff brought a suit for a declaration that the property in suit, which she claimed under a sale deed, was not liable to attachment and sale in satisfaction of the decree held by defendant 1 against defendant 2. The decree was for Rs. 2,000. The suit was valued at Rs. 25,000. The suit was decreed. The defendant preferred an appeal to the High Court.

Held: that the proper valuation of the suit was Rs. 2,000 and therefore the appeal lay to the District Judge and not to the High Court.

[P 437 C 1]

Shiam Krishna Dar and Narain Prasad Ashthana—for Appellant.

Tej Bahadur Sapru, Ibn Ahmad and Girdhari Lal Agarwala—for Respds.

Judgment.—The first question which arises in this appeal is whether the appeal lies to this Court. For the decision of that question we have to determine what was the value of the subject-matter of the suit in the Court below. If the amount of that value was below Rs. 5,000 the appeal would not lie to this Court but lay to the Court of the District Judge. The suit was brought under the following circumstances: Defendant 1, who is the appellant here, holds a decree against defendant 2, the husband of the plaintiff respondent. In execution of that decree he caused the property in suit to be attached as the property of his judgment-debtor. An objection was preferred by the plaintiff claiming the property under a sale deed alleged to have been executed in her favour on 22nd May 1912. Her objection having been overruled, she brought the present suit on 4th

January 1913 and asked for a declaration that the property in suit "was not liable to attachment and sale in satisfaction of the amount due to defendant 1," and she also prayed that her right to the property be declared. She alleged the date of the cause of action to be 4th January 1913. No doubt she made her husband a party to the suit, but she asked for no relief against him and did not allege any cause of action which would entitle her to sue him. Apparently her husband was only made a formal defendant to the suit. The lower Court decreed her claim and the decree-holder, defendant 1, has preferred this appeal. No doubt in the plaint the value of the subject-matter for purposes of jurisdiction is stated to be Rs. 25,000, but this, in our opinion, was clearly erroneous. As we have already said the plaintiff claims no relief against her husband, and she does not allege any cause of action as against him. All that she asks for is that it be declared that the amount of the decree held by defendant 1 ought not to be realized from her property, that is, from so much of it the value of which would be equivalent to the amount of the decree. It is admitted in this case that the amount of the decree is about Rs. 2,000. It is therefore clear that the object of the suit is to relieve the property from a burden to the amount of Rs. 2,000 which the decree-holder, defendant 1, is seeking to impose on it by attaching the property. The whole of the property is not in dispute, and under the attachment and the sale which might take place in pursuance of it, the whole property cannot be sold, but only so much of it as will be sufficient for the realization of the amount of the decree. Therefore, the value of the subject-matter of the suit is the amount of the decree, and not the amount of the actual value of the property or the value for which the plaintiff alleges that she purchased it.

The matter was decided by this Court in the case of *Dwarka Das v. Kameshar Prasad* (1), and the same view was adopted in *Dhan Devi v. Zamurad Begam* (2). The matter was considered by their Lordships of the Privy Council in the recent case of *Phul Kumari v. Ghanashyam Misra* (3). The exact point which

(1) [1895] 17 All. 69=1895 A. W. N. 3.

(2) [1905] 27 All. 440=2 A. L. J. 115(F.B.).

(3) [1903] 35 Cal. 202=35 I. A. 22 (P.C.).

s now before us was not in issue before their Lordships, but there are observations in the judgment which clearly support the view taken by this Court. Their Lordships say:

"The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit."

In the case before us the amount of the decree is below Rs. 5,000 and much below the actual value of the property. Therefore, according to the view expressed by their Lordships, the value of the suit should be regarded as the amount of the decree. That amount being less than Rs. 5,000 an appeal from the decree of the Court below lay to the District Judge and not to this Court. We accordingly direct that the memorandum of appeal be returned to the appellant for presentation to the proper Court. Under the circumstances we make no order as to the costs of this appeal.

V.B./R.K.

Order accordingly.

A. I. R. 1915 Allahabad 437

RICHARDS, C. J. AND KNOX, J.

Dhani Ram and another—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 663 of 1915, Decided on 30th October 1915.

Oaths Act (10 of 1873), Ss. 6 and 13—Deliberately not administering oath to child does not make evidence inadmissible—Child satisfactory witness when it understands it and can repeat—Evidence Act (1872), S. 118.

The mere fact that a Court advisedly refrained from administering oath to a witness, who was a child of tender years, does not make his statement inadmissible in evidence. A Court should only examine a child of tender years as witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what he has seen and afterwards to inform the Court thereof. If the Court is of opinion that by reason of tender years, the child is unable to do this, it ought not only to refrain from administering oath but from examining the child at all. If, on the other hand, the Court thinks that the child, though of tender years, is capable of informing the Court of what it has seen or heard, it is best that the Court should comply with the provisions of S. 6, Oaths Act. [P 438 C 1]

A child is frequently a most satisfactory witness when the matters deposed to are not beyond the intelligence of the child. [P 438 C 2]

A. E. Ryves—for the Crown.

Judgment.—Dhani Ram and Chotey Lal have been found guilty of the murder of Durga Prasad and sentenced to

death. They have appealed. Accused 2 is the son of accused 1. The deceased was the only son of Sobha Ram, a brother of accused 1. Accused 1 had another son called Salig who died childless leaving a widow Mt. Deo Kunwar. On 16th August 1911, Durga Prasad made a will in favour of accused 2, leaving him all his property. Beyond all question, Durga Prasad was most brutally murdered. Dhani Ram in the Court below admitted the murder and he admits it in his petition of appeal. Chotey however denies his guilt. The case for the prosecution is that the motive for the murder was to anticipate the succession to Durga Prasad's property and to prevent him incurring more debts, mortgaging or dealing with his property or cancelling the will. Dhani Ram says that he murdered the deceased because he caught him in the act of having sexual intercourse with Mt. Dec Kunwar. The family house is divided into three parts. The two accused lived in the western portion. Durga Prasad lived in the eastern portion. There was another brother of accused 1 named Behari. He died leaving a son Choke Lal (not to be confused with accused 2). This Choke Lal lived in the central part. Two doors lead from Dhani Ram's portion into Choke Lal's, and there is an open courtyard which belonged half to Durga Prasad and half to Choke Lal. On the morning of 18th May at daybreak accused 2 went to Tota Ram, chowkidar, and told him that Dhani Ram wanted him. He and another chowkidar went to the house and found Durga Prasad lying dead. Dhani Ram said that four men, Sri Pal, Umrao, Pearay Lal and Ram Sarup had killed Durga Prasad. A report to that effect was made at the thana by Dhani Ram. It is now admitted that this charge was absolutely false. This gives some idea of the class of men the accused are. It is impossible to believe that accused 2 did not know of the false charge that was being made against four innocent men; he must also have known that Durga Prasad was lying dead.

The learned Sessions Judge has given the most cogent reasons for not believing the story that the deceased was murdered because he was caught in the act of illicit connexion with the Mussamat. This charge is like the charge made against the four men: an absolute lie.

We are quite satisfied that the woman was not even in the house at the time and that the motive was to get rid of Durga Prasad so as to get his property. The evidence against Dhani Ram is overwhelming and he admits it even now.

We proceed to consider the case as against accused 2. It is improbable that the father would have committed the murder alone. If we are correct in the view we take of the motive, Chotey had a greater motive than the father.

A little boy of the name of Ram Rup, aged about six years, was examined in the Court below. His statement is beyond question of the utmost importance. It directly implicates, and if believed, brings home guilt to accused. There is evidence that the boy made the same statement immediately after the murder. One of the grounds of appeal was based on the decision in *Queen-Empress v. Maru* (1). The objection was that the learned Judge, having "advisedly" refrained from administering the oath to the little boy, his statement is inadmissible. We are not prepared to accept altogether the ruling in the case of *Queen-Empress v. Maru* (1). No doubt S. 6, Oaths Act 10 of 1873, provides that (save as in the section provided) every witness shall make an oath. S. 13 of the Act however provides that no omission to take any oath shall invalidate any proceeding or render inadmissible any evidence whatever in or in respect of which such omission took place. We are unable to hold that the mere fact that the Court advisedly refrained from administering the oath, renders the statement of the witness inadmissible. In our opinion, a Court should only examine a child of tender years as a witness after it has satisfied itself that the child is intellectually sufficiently developed to enable it to understand sufficiently what it has seen and to afterwards inform the Court thereof. If the Court is of opinion that, by reason of tender years, the child is unable to do this, it ought not only to refrain from administering the oath but from examining the child at all. If on the other hand the Court thinks that the child, though of tender years, is capable of informing the Court of what it has seen or heard, it is best that the Court should comply with the provisions

of S. 6 in the case of a child just as in the case of any other witness. Whether or not a child should be examined, must depend on the circumstances of the particular case including, of course, the nature of the evidence he is about to give. It seems to us pretty clear from the record that the boy Ram Rup was intelligent. We thought it nevertheless advisable to examine the boy ourselves, the charge being the grave one of murder. We accordingly had the boy produced before us in the presence of the accused, the oath was duly given and the witness examined. Having seen and heard the boy we have not the least hesitation in saying that he was quite capable of giving evidence in the case.

The committing Magistrate examined the boy on oath and appears to have been favourably impressed. As already stated, this appeared from the record itself. Not only was the boy examined on the direct but he was cross-examined at considerable length on behalf of the accused. In many ways, it is much more difficult to tutor a child than an older person. The child may no doubt learn a story, but it would be very difficult to prepare a child for questions on cross-examination outside the story. Furthermore a child of tender years finds it difficult to disguise the fact that he has been tutored. When the matters deposed to are not beyond the intelligence of the child, he is frequently a most satisfactory witness. His tender years render him less capable of deceiving the Court. In the trial Court, Ram Rup was asked if he had seen Chote's sister-in-law (the woman with whom the first accused said he caught the deceased in the act of sexual intercourse). The boy said he did not see her that day; that she lived in her father's house. We think if the woman had been in the house, the boy most certainly would have said so. The question was asked by the Court. The statement which the accused 1 has made throughout corroborates the boy in so far as the boy says that he witnessed the occurrence. If Choke tutored his little son, he need only have tutored him to substitute accused 2 for himself. He need not have tutored him to deny the presence of the woman. Ram Rup in the Court below stated that he had seen the two accused hitting Durga Prasad. He said that

(1) [1888] 10 All. 207=(1888) A. W. N. 86.

Dhani Ram used a lathi and Chote a gandasa. In the Court below, some point was made that the story of the gandasa must be untrue.

The learned Sessions Judge points out that it does not necessarily follow that because the wounds on the body do not appear to have been inflicted by a sharp edged weapon, neither accused had a gandasa. The side of the gandasa or the back have been used. The little boy still adheres to the statement that there was a gandasa. There is a discrepancy between his evidence before us and his statement in the Court below when he states before us that both the accused had lathis. The real important matter for consideration with respect to the evidence of this witness is not whether he is accurate in every detail, but whether it is possible that he has been tutored by his father Choke to substitute accused 2 for him. As we have already stated, accused 1 has admitted all along that Durga Prasad was murdered by him and that another man was with him but he says that the second man was Choke and not his son Chote. According to the evidence of Gokul Chand, the little boy stated that Durga Prasad had been killed by Chote Lal and Dhani Ram immediately after the murder. Brij Basi says the same thing. We ourselves are quite satisfied that the little boy has told the truth when he says that both the accused committed the murder. It must be borne in mind that Choke, the father of this little boy, had no motive for murdering Durga Prasad. Chote, the second accused, had a motive. The will was in his favour. It was he who went to fetch the chowkidar and told him that Dhani Ram wanted to see him. It is true that he did not tell the chowkidar why he was wanted, but this fact is rather against Chote than in his favour. When he went to fetch the chowkidar, he must have known that Durga Prasad was lying dead in the house. He must also have known that his father's charge against the four men was false. It seems to us much more probable that Chote would have been his father's accomplice in the murder than Choke.

After the boy Ram Rup had been examined before us, Dhani Ram put some questions and made a long statement reiterating that Durga Prasad was killed because he was caught in the act of hav-

ing intercourse with the Mussammatt Chote, the son, however declined to ask any questions or make any statement. We believe that the old man is trying to save his son and that the probabilities are that the latter is morally speaking the more guilty of the two. We are quite satisfied that the evidence given on behalf of accused 2, that he was absent when the murder was committed, is false. This is shown by the evidence of Toto that it was accused 2 who came to him with the message that accused 1 wanted him. The message was delivered very early in the morning.

After careful consideration of the case, we are quite satisfied that the unanimous opinion of the learned Sessions Judge and of the assessors is correct. We dismiss the appeal, confirm the convictions and sentences and direct that the latter be carried into execution according to law.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 439

RICHARDS, C. J. AND BANERJI, J.

Kedar and others—Plaintiffs—Appellants.

v.

Deo Narain and another—Defendants—Respondents.

Letters Patent Appeal No. 13 of 1915, Decided on 16th July 1915.

Agra Tenancy Act (2 of 1901), S.32—S 32 does not bar suit by transferee of portion of fixed rate holding for possession against tenant in possession of whole.

A transferee of a portion of a fixed rate holding sued for possession of the portion purchased by him, the tenant who was entitled to only 1/3th of the holding but was in possession of the whole.

Held, that the suit was not barred by S. 32, Agra Tenancy Act [P 440 C 1]

Brij Nath Vyas—for Appellants.

M. L. Agarwala—for Respondents.

Facts—A certain fixed-rate holding consisted of 4 biswas. Out of this, the plaintiffs purchased a 1-biswa share. The defendants owned the remaining 3 biswas. The plaintiffs brought the present suit for possession of the share purchased by them, alleging that the defendants were in possession of the whole holding. The Court of first instance, the lower appeal Court, and a single Judge of the High Court dismissed the suit on the ground that S. 32, Act 2 of 1901, barred the suit.

Judgment.—This appeal arises out of a suit in which the plaintiff claimed 1

biswa, which was alleged to be part of 4 biswas which constituted a fixed-rate holding. The lower Courts and this Court have dismissed the suit as being barred by S. 32, Tenancy Act, and as having been concluded by the authority of the case of *Abhey Lal v. Janki Prasad* (1). S. 32, Agra Tenancy Act, provides that

"no division of a holding or distribution of the rent payable in respect thereof made by the co-sharers therein, shall be binding on the landholder, unless it is made, with his consent."

Cl. 2 provides that

"No suit or other proceeding for the division of a holding or distribution of the rent thereof shall be entertained in any civil or revenue Court."

It is quite clear that all that S. 32 provides against is the splitting up of a holding or the distribution of the rent so as to bind the landholders. Cl. 2 does no more than enact that a suit brought for such a purpose shall not be entertained by a civil or revenue Court. In the present case the plaintiff alleges that he has become the owner entitled to possession of a portion of a fixed-rate tenancy and that the defendant is a trespasser. He does not ask for the division of the holding nor for the distribution of the rent. He does not seek to bind the landholder in any way by the suit he brings. It seems to us therefore that S. 32 does not bar the present suit. We may mention that the case relied upon by the lower appellate Court and the learned Judge of this Court has been overruled by the Full Bench decision in *Najibullah v. Gulsher Khan* (2). As the suit was decided on a preliminary point in the lower Courts the case must be remanded. We accordingly allow the appeal, set aside the decree of this Court and also of both the Courts below, and remand the case to the Court of first instance through the lower appellate Court with directions to re-admit the suit under its original number in the file and proceed to hear and determine the same according to law. Costs here and hitherto will be costs in the cause.

V.B./R.K.

Case remanded.

(1) [1907] 29 All. 65=3 A. L. J. 735=(1906) A. W. N. 274.

(2) [1909] 31 All 348=1 I. C. 594 (F. B.)

A. I. R. 1915 Allahabad 440

TUDBALL, J.

Ikram Ullah Khan—Defendant—Appellant.

v.

Muhammad Yunis Ali Khan—Plaintiff—Respondent.

Second Appeal No. 1132 of 1914, Decided on 6th April 1915, from decree of Sub- Judge, Budaun.

Cosharer—Party wall cannot be interfered with or built upon without consent of another.

One of the tenants-in-common is not entitled to interfere with or build upon the party wall without the consent of the other tenants-in-common. *Watson v. Gray*, (1880) 14 Ch. D. 192 and 19 *Mad.* 38, *Foll.* [P 441 C 2]

Iqbal Ahmad for Appellant.

Shafi-uz-zaman—for Respondent.

Judgment.—This appeal arises out of a suit brought by the plaintiff-respondent in which he asked the Court for a perpetual injunction to restrain the defendant from interfering with his building a certain wall. The parties are owners of adjoining houses. The plaintiff wished to build an upper storey on the room which is marked (A) in the plan attached to the plaint. The defendant objected. Hence the suit. The plaintiff was desirous of building on the two walls running west and east and north and south which divide the two houses. There were other reliefs and other matters in the suit with which however we are not concerned on appeal. The question before me is whether or not the plaintiff is entitled to raise the party walls in dispute without interference on the part of the defendant. The Court of first instance dismissed the suit. The plaintiff appealed. He there stated that the party walls belonged to him and to himself and that he had a right to build upon them. The lower appellate Court found, as a matter of fact that the party walls belonged to the plaintiff and the defendant jointly. To use the lower Court's own expression it found that they were joint owners of these party walls. This is a clear finding that the parties are tenants-in-common of the walls. The lower appellate Court held that the plaintiff would be entitled to build on that half of the wall which is towards his own house, and it therefore decreed the suit accordingly. The defendant has appealed. Two points are pressed, first of all that the question of the ownership

of the wall is *res judicata* by reason of a previous decision and the second is that on the findings of fact arrived at by the Court below the plaintiff is still not entitled to build upon the party walls without the defendant's consent. In regard to the question of *res judicata* there is no force in the plea, for the simple reason that the portion of the wall now in dispute between the parties was not in dispute in the former litigation and therefore the decision in the latter cannot operate as *res judicata*. But the defendant, in my opinion, is entitled to succeed on the second plea raised before me. The question of the right of one tenant-in-common of a party wall to build upon the wall or to interfere with it is one which is covered by decisions. The case of *Watson v. Gray* (1) clearly lays down on principle that in such a case as this one of the tenants-in-common is not entitled to interfere with the party wall without the consent of the other tenant-in-common. The same point was decided in the case of *Kanakayya v. Narasimhulu* (2). In that case one of two tenants-in-common of a party wall raised the height of the wall with a view to raise a superstructure of the wall.

The other tenant-in-common who had not consented to the alteration in the wall but had suffered no inconvenience therefrom sued to enforce the removal of the newly erected portion. It was held that the plaintiff was entitled to the relief sought and the ruling in *Watson v. Gray* (1) was followed. From the principle laid down in these decisions it is clear that the plaintiff is not entitled to build upon the party walls in suit without the consent of the defendant and that the lower appellate Court was wrong in issuing an injunction to the latter to prevent him from interfering with the building of the superstructure which the plaintiff wished to raise on the party wall. The appeal is therefore allowed. The plaintiff has filed objections against the finding of the Court below that the walls belonged jointly to the parties in suit. The decision is on a question of fact and no error in law has been laid down before me to vitiate that decision. The objec-

tions are therefore disallowed with costs. The plaintiff's suit will stand dismissed with costs in all Courts. The original Court dismissed the suit in toto. The plaintiff in his appeal to the Court below only pressed the question of his right to build on the party wall.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 441

BANERJI AND WALSH, JJ.

Barati Lal—Defendant—Appellant.

v.

Salik Ram—Plaintiff—Respondent.

Second Appeal No. 1402 of 1914, Decided on 29th November 1915, from decree of District Judge, Shahjahanpur, D/- 21st September 1914.

Transfer of Property Act (4 of 1882), S. 6—Dispute between reversioner and daughter of last male owner—Compromise agreement to relinquish his claim for consideration—Transaction not transfer of *spes successionis* but settlement of disputed claim.

One Bhagga Lal died possessed of certain property and his daughter-in-law got possession of it. On the death of the daughter-in-law, one Barati Lal made an application for mutation of narnes on the ground that he was the heir of Bhagga Lal. This application was opposed by Mohan Dei, daughter of Bhagga Lal. The dispute resulted in execution of a document by which Barati Lal for a consideration of R. 5,000, and on receipt of certain immovable property, abandoned his entire claim to the property recognizing Mt. Mohan Dei to be absolute owner of it.

Held, that the transaction was not a sale of the reversionary rights of Barati Lal, but was a settlement of disputed claims and was not void under S. 6, T. P. Act. [P 442 C 1]

Tej Bahadur Sapru—for Appellant.*Gokal Prasad and Sarat Chandra Chowdhry*—for Respondent.

Judgment.—This appeal arises out of a suit in which the plaintiff-respondent claimed possession of a house purchased by him from two persons, namely Mt. Shamo and Khunni Lal. He purchased half the house from Mt. Shamo and the other half from Khunni Lal on different dates. There is no dispute in this appeal in respect to the half-share purchased from Mt. Shamo. As regards the half-share purchased from Kunni Lal the facts are these: The share in question belonged to Bhagga Lal and after his death was apparently in the possession of his daughter-in-law, the widow of a predeceased son. Upon her death the appellant Barati Lal made an application in the revenue Court for the entry of his name as the heir of Bhagga Lal

(1) [1880] 14 Ch. D. 192=49 L. J. Ch. 243=42 L. T. 224=28 W. R. 438=44 J. P. 537.

(2) [1896] 19 Mad. 88.

and the owner of his property. This application was resisted by Mt. Mohan Dei, the daughter of Bhagga Lal, who asserted that her father was separate and that she was entitled to succeed to the property. The dispute resulted in the execution of a document on 24th May 1911 by Bharati Lal which purported to be a deed of relinquishment. By that document, Barati Lal, for a consideration of Rs. 5,000 and on receipt of certain immovable property, abandoned all his claim to the estate of Bhagga Lal, and recognized the title of Mt. Mohan Dei as absolute owner. Mt. Mohan Dei being dead, the property passed to her husband Kunni Lal who sold it to the plaintiff. Barati Lal's contention was that the transaction of 24th May 1911 was a sale by him of his reversionary rights and was therefore invalid under the provisions of S. 6, T. P. Act. This contention found favour in the Court of first instance, but was overruled by the lower appellate Court which decreed the claim of the plaintiff. In our opinion the decision of the lower appellate Court is correct. The learned Judge held that the transaction of 24th May 1911 was in fact and substance a settlement of disputed claims. We agree with this view. There was a claim put forward by Barati Lal to the property of Bhagga Lal as the person entitled to it upon the death of Bhagga Lal's daughter-in-law. That claim was denied by Mt. Mohan Dei. One party approached the other, and, upon receipt of consideration from Mt. Mohan Dei, Barati Lal abandoned his claim to the property. This was not a mere transfer of reversionary rights within the meaning of S. 6, T. P. Act. The case is very similar to that of *Mohammad Hashmat Ali v. Kaniz Fatima* (1). In this view the appeal must fail, and it is unnecessary to consider the question of estoppel which was argued with great ability on behalf of the appellant. We dismiss the appeal with costs including fees on the higher scale.

V.B./R.K.

*Appeal dismissed.***A. I. R 1915 Allahabad 442**

PIGGOTT, J.

Madho Sonar—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 381 of 1915, Decided on 21st May 1915, from order of Sess. Judge, Allahabad.

(a) **Penal Code (45 of 1860), S. 353—Person assaulting officer conducting search not complying with provisions of Ss. 165 and 166, Criminal P. C., cannot be convicted under S. 353—Criminal P. C. (5 of 1886), Ss. 165 and 166.**

A police officer conducted a search in the house of the accused, who did not reside within the limits of his jurisdiction, accompanied by a constable of the police station which had jurisdiction, but the constable had no order, either written or verbal from his own Sub-Inspector. While engaged in the search they were assaulted by the accused who was convicted under S. 353, I. P. C.:

Held: that as the provisions of Ss. 165 and 166, Criminal P. C., were not complied with, conviction under S. 353, I. P. C., could not be maintained. [P 443 C1]

(b) **Penal Code (45 of 1860), Ss. 353, 333 and 332—Officers to be entitled to protection must scrupulously comply with provision of law particularly in cases of search.**

It is of great importance that police officers in the discharge of their duty should receive the protection of such sections as 353, 333 and 332, I. P. C. but in order to entitle them to the protection of those sections police officers must comply scrupulously with the provisions of the law, particularly when they undertake an act such as searching the house against the will of the accused. [P 443 C1]

Iqbal Ahmad—for Applicant.*R. Malcomson*—for the Crown.

Judgment.—The conviction in this case has been had under S. 353, I. P. C. It lay on the prosecution to prove that the public servants assaulted, namely the police constables Nazir Husain and Darsan Singh, were in the execution or in the lawful discharge of their duty as such public servants at the time when the assault was committed. They were endeavouring to search the house of the applicant Madho Sonar. Not only is it not proved by the evidence on the record that the provisions of S. 166 read with Cl. (3), S. 165, Criminal P. C., had been complied with, but, as a matter of fact, a breach of those provisions becomes patent on an examination of the evidence given by Sub-Inspector Taj Dat Pande and constable Darsan Singh. The Sub-Inspector seems to have acted under a belief, and probably quite a bona fide belief, that it was sufficient compliance with the law if he sent intimation to the

Sub-Inspector of Manda Police Station of his intention to conduct a search within the limits of the latter's jurisdiction and secured the presence at the search of a constable belonging to the Manda Police Station. This is not sufficient compliance with law. Apart from the fact that police constable Darsan Singh had no order in writing from the Sub-Inspector of Manda directing him to make the search, it is obvious enough from his evidence that he had received no order either written or verbal, from his own Sub-Inspector. He thought he was doing his duty in coming to the assistance of the Sub-Inspector from another circle on receiving an intimation from the latter that his presence was required.

It is no doubt of great importance that police officers in the discharge of their duty should receive the protection of such sections as 353, 333 and 332, I. P. C. but in order to entitle them to the protection of those sections police officers must comply scrupulously with the provisions of the law, particularly when they undertake an act such as searching a house against the will of the owner. In the present case the conviction under S. 353 cannot be maintained. No doubt on the evidence some lesser offence was probably committed by the applicant Madho Sonar; but it would seem that he has been undergoing sentence of imprisonment for more than a month, so that I do not think it necessary to go further into the question with a view to deciding whether he can be convicted of some lesser offence. In so far as he may have been guilty of any breach of the law in opposing the police officers, I have no doubt that he has been quite sufficiently punished by the imprisonment which he has already undergone. I set aside the conviction and the sentence in this case and direct that the applicant Madho Sonar be released.

V.B./R K. *Conviction set aside.*

A. I. R. 1915 Allahabad 443

CHAMIER AND PIGGOTT, JJ.

Emperor

v.

Rahmat and others—Accused.

Criminal Appeal No. 186 of 1915, Decided on 21st April 1915, from an order of acquittal by the Offg. Sess. Judge, Agra.

Criminal P. C. (5 of 1898), S. 345—Offence under S. 325, I. P. C., cannot be compounded by complainant's heir

An offence punishable under S. 325, I. P. C. is compoundable with the permission of the Court, but it is compoundable by the person to whom the hurt was caused. In a case, where the person to whom the hurt was caused is dead, the case cannot be compounded by his heir

[P 443 C 2]

A. E. Ryves—for the Crown.

J. M. Banerji and Benole Behari for *C. R. Alston*—for Accused.

Judgment.—This is a Government appeal against an order of acquittal and is brought under the following circumstances: There were four accused persons Rahmat, Moti, son of Pir Bakhsh, Jhandu and Moti, son of Khilari, all of the Banjara caste, and the case against them was that they had beaten with lathis their caste fellow Pir Bakhsh, inflicting serious injuries which, as a matter of fact, resulted in the death of the said Pir Bakhsh. The Magistrate who inquired into the case for reasons given by him framed a charge under S. 325, I. P. C. but committed the accused persons for trial before the Court of Session. The case unfortunately came before a Sessions Judge of very limited experience. He rejected an application made on behalf of the prosecution for amendment of the charge into one under S. 304, I. P. C., or S. 302, I. P. C., and then permitted the case to be compounded upon an arrangement come to between the accused persons and the widow of the deceased. He thus acquitted the accused without taking any evidence at all. The order is obviously illegal. An offence punishable under S. 325, I. P. C., is no doubt compoundable with the permission of the Court, but it is compoundable by the person to whom the hurt was caused. In this case the person to whom the hurt was caused was dead and the case was certainly not compoundable by his widow.

In dealing with this matter to-day we are placed in a certain difficulty. Moti, son of Pir Bakhsh, has been arrested and has had notice of today's hearing. He has been represented before us by counsel. The other three accused persons cannot be found and are presumably absconding. The warrant issued by this Court for their arrest has not hitherto been executed. Notices of today's hearing were issued to them, and they have

been served on their near relatives, but they themselves cannot be found. The Government Advocate, who appears in support of the appeal, informs us that he is willing to withdraw the appeal as against the three absconding accused provided this Court is prepared to take up the case, so far as they are concerned, in the exercise of its revisional jurisdiction. The case is a very clear one and there is no question of convicting any of the accused on the evidence upon the record. Over and above setting aside the order of acquittal, all that we could do would be to direct these persons to be tried. Under these circumstances we think that the three absconding accused have been given a reasonable opportunity of being heard today in their defence within the meaning of Cl. 2, S. 439, Criminal P. C., and that we can take up the question as regards them in the exercise of our revisional jurisdiction.

With regard to Moti, son of Pir Bakhsh, therefore we so far accept this appeal that we set aside the order of acquittal passed in respect of the said Moti and direct that he be put on his trial before the Court of Session. As regards Rahmat, Jhandu and Moti, son of Khilari, the Government appeal against their acquittal is withdrawn. Taking up the matter in the exercise of our revisional jurisdiction we set aside the order acquitting these three men which is clearly an illegal order. We leave the local authorities to take such steps with regard to the prosecution of these three men as they may consider suitable.

V.B./R.K.

Appeal allowed.

A I. R. 1915 Allahabad 444

RICHARDS, C. J. AND PIGGOTT, J.

"Daya Kishen—Appellant.

v.

Mahomed Wazir Ahmad—Respondent.

Letters Patent Appeal No. 42 of 1915, Decided on 2nd July 1915, from judgment of Rafique, J.

Landlord and Tenant—Character of occupancy holding not changed by planting grove with zamindar's consent—Trees are non-transferable.

Where an occupancy tenant plants a grove on his holding with the permission of the zamindar, the character of the holding is not changed. The tenant has no right to transfer the trees nor can they be sold in execution of a decree against him. [P 445 C 2 ; P 446 C 1]

Uma Shankar Baggai—Appellant.

Abdul Raoof—for Respondent.

The Letters Patent appeal was preferred from Rafique, J.'s following

Judgment.—This appeal arises out of a suit brought by a zamindar for a perpetual injunction restraining the defendant from cutting down trees of a grove or otherwise interfering with his (zamindar's) possession over it. It was alleged in the plaint that Moulvi Wazir Ahmad, the plaintiff, was the zamindar of the village of Sitabnagar, and that Bhopal and others were his tenants in respect of plots, among others, numbered 74, 81 and 89. There was a mango grove on the said plots, which was in the possession of Bhopal and others merely as his tenants whose sole right in the grove was that of taking fruit. They had no right of transfer in respect of the trees of the grove nor could the said trees be sold in execution of a decree against them. One Daya Kishen in execution of his decree against them had some of the trees of the said grove put up to auction and purchased them himself on 28th June 1911. The said sale was void at law and put an end to the rights of the tenants in the grove and the plaintiff became entitled to its possession. He entered on possession but Daya Kishen, the purchaser, with the help of two others attempted to cut down the trees purchased by him and was prevented by the plaintiff. The plaintiff therefore sued for perpetual injunction restraining Daya Kishen and his friends from cutting down any trees of the grove in question or otherwise interfering with the plaintiff's possession over the said grove.

The claim was resisted on various grounds. The pleas with which we are concerned in this appeal were that plots Nos. 74, 81 and 89 were granted to Debi Singh, ancestor of Bhopal and others, by the zamindar of the village for planting a grove and Debi Singh accordingly planted a grove, and his descendants had a proprietary right in the grove which they could transfer either privately or which could be sold in execution of a decree against them. Moreover, under a custom obtaining in the village and also under the terms of the Wajibdarz tenants have a transferable right in the trees in their possession. The learned Munsif held that the land of the grove in suit had not been granted to Debi Singh for planting a grove, but was his occupancy holding over which he had

planted a grove. He further held that the custom set up by the defence was not proved and that the terms of the *Wajibularz* were not applicable to the present case. The claim was accordingly decreed. Daya Kishen, the auction-purchaser of the trees, preferred an appeal. The only point urged on his behalf before the learned Subordinate Judge was that under the terms of the *Wajibularz* of the village of Shitabnagar tenants had a transferable right in the trees planted by them. In order to dispose of the question raised in the appeal the learned Subordinate Judge framed a fresh issue and remitted it for trial to the first Court. The finding of the first Court on the fresh issue did not support the contention of the appellant that under the terms of the *Wajibularz* a tenant had a right of transfer in the trees planted by him on his holding. The learned Subordinate Judge accepted the finding of the first Court, but for other reasons held that the tenants of the grove in suit had a right of transfer in the trees. He accordingly accepted the appeal and dismissed the claim of the plaintiff. The latter has come up in second appeal to this Court.

He contends that an occupancy or non-occupancy tenant who plants trees on his holding has no right of transfer in the trees in the absence of a custom or contract to the contrary. The following cases are relied upon in support of this contention : *Kasim Man v. Banda Husain* (1), *Imdad Khatun v. Bhagirath* (2), *Kausalia v. Gulab Kuar* (3), *Janki v. Sheodhar* (4), *Wahida Khatun v. Bulaqi Das* (5). For the respondent the reply is that the finding of the lower appellate Court is that the land of the grove in suit was given to Debi Singh on a fixed rent for the purpose of planting a grove and therefore the principle laid down in the cases relied upon by the appellant does not apply. It is said that when a zamindar grants land on rent to a person to plant a grove, that person has a right of transfer in the trees. In support of his argument, the respondent refers to the following cases : *Muhammad Ismail Khan v. Mithu Lai* (6), *Habibullah v.*

Kalyan Das (7). The case law, no doubt, makes a distinction between the rights of a tenant, occupancy or non-occupancy, who plants trees on his holding and of a person who is given land at a specified rent solely for the purpose of planting a grove. The contention of the respondent must prevail if it has been found that the land of the grove in suit was granted to Debi Singh for the purpose of planting a grove. It is true that the learned Subordinate Judge does say that he thinks that the land of the grove in suit was let to Debi Singh on a fixed rent for the purpose of planting a 'grove. But there does not seem to be any evidence in support of this finding. The defendant-respondent produced evidence to prove that the plaintiff-appellant had granted the land of the grove in suit to Bhopal and others who had planted the grove. The first Court disbelieved that evidence.

The learned Subordinate Judge did not accept it also, for he holds that the land was granted to Debi Singh. He means presumably that the land was granted by the former zamindars, as the plaintiff-appellant was not the zamindar in the lifetime of Debi Singh. In fact the learned Subordinate Judge in an earlier part of his judgment accepts the finding of the first Court that the grove in question was planted with the permission of the former zamindars. The revenue papers show that the land of the grove was the occupancy holding of Debi Singh for a long time before any trees were planted by him on it. The reason for the finding seems to be that the learned Subordinate Judge thought that the permission of the former zamindars, which was assumed in the absence of any protest by them, to Debi Singh to plant a grove, amounted to the grant of a fresh lease to him of the land for the purpose of planting a grove. If that were a valid reason the cases referred to above by the appellant were erroneously decided. But I do not think that it can be said that the permission by a zamindar to his occupancy or non-occupancy tenant to plant trees on his holding cancels the original lease and is a fresh lease for the purpose of planting trees. The finding under discussion being unsupported by any evidence cannot be accepted. The character of the grove in question then

(1) [1883] 5 All. 616=(1883) A.W.N. 169.

(2) [1888] 10 All. 159=(1888) A.W.N. 32.

(3) [1899] 21 All. 297=(1899) A.W.N. 72.

(4) [1901] 23 All. 211=(1901) A.W.N. 52.

(5) [1906] 3 A.L.J. 385=(1906) A.W.N. 140.

(6) [1912] 17 I.C. 656.

(7) A.I.R. 1914 All. 428=25 I.C. 169.

s that it was planted by an occupancy tenant on his holding. He or his successors have therefore no right of transfer in the trees. They cannot be sold privately or in execution of a decree against Bhopal and others.

But it is further contended for the respondent that as soon as the grove was planted by Debi Singh, the land lost its character as an occupancy holding and the zamindar could have ejected him. The zamindar having failed to do so, Debi Singh became a trespasser and his possession became adverse to the zamindar. Debi Singh and his successors have been in adverse possession for more than 12 years prior to the sale of the trees, and hence the plaintiff-appellant cannot question the sale to Daya Kishen. No such plea was taken by the latter in his defence. But apart from that the case of Daya Kishen was and the finding of the lower Court is that the trees were planted with the permission of the former zamindars. No question of adverse possession can therefore arise. The appeal prevails, the decree of the lower appellate Court is set aside and that of the first Court is restored. Costs are allowed to the appellant throughout.

Judgment—We think the decision of the Judge of this Court is correct. We dismiss the appeal.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 446

RICHARDS AND BANERJI, JJ.

Kulsumunnisa Bibi—Applicant.

v.

Chaube Basudeo and others—Opposite Parties.

Privy Council Appeal No. 16 of 1914, Decided on 24th October 1914, from Decision of High Court, in Second Appeal No. 1456 of 1913.

Civil P. C. (5 of 1908), S. 110—History of property in dispute same as other property worth more than Rs. 10,000 does not give right to appeal to Privy Council.

A suit relating to 2 bighas 12 biswas of land valued at only Rs. 1,000 came up in second appeal to the High Court and was disposed of. The history of the land in dispute was the same as that of another 300 bighas of land in the same mahal.

Held, that the mere fact that the history of the property in dispute was the same as that of the other land in the mahal valued at more than Rs. 10,000 did not involve a claim in question within the meaning of S. 110 so as to give the applicant a right of appeal to His Majesty in Council. [P 445 C 2]

Order.—This is an application for leave to appeal to His Majesty in Council. The suit only related to 2 bighas 12 biswas of land and was valued at only Rs. 1,000. This Court in second appeal reversed the decree of the lower appellate Court and restored the decree of the Court of first instance. The case prima facie does not fulfill the conditions of S. 110, Civil P. C. It is however contended on behalf of the applicant that the decree of this Court directly involves a claim or question to or respecting property of the value of Rs. 10,000. The history of the land in dispute, no doubt, is the same as that of another 300 bighas or three dants in the same mahal. The question in the suit was the status of the mortgagors of the plaintiff. If they were merely tenants they would have had no right to mortgage their holdings and they could not have been prevented from surrendering their tenancies to the zamindars. It is contended that the owners or occupiers of the remainder of the other land may now set up that they are not tenants, as the result of the decision of this Court in the present suit, and that therefore some question relating to the rest of the land, which exceeds in value Rs. 10,000, is involved in the decree of this Court.

We cannot agree with this contention. The case of *Sri Kishan Lal v. Kashmiro* (1) has been cited. There the question in suit related to the validity of an arbitration award. The High Court, reversing the decision of the Court below, had held that the award was not binding on Mt. Kashmiro. The judgment proceeds:

“If the decree of this Court becomes final, the question of the validity of the award will also become final as regards property other than the property in dispute in the present suit. It is therefore clear that the decree of this Court does involve a question relating to property of the value exceeding Rs. 10,000.”

It is clear the case was decided on its own facts. The mere fact that the history of the property is the same does not involve a claim or question within the meaning of S. 110 as to give the applicant a right of appeal to His Majesty in respect of the two bighas odd. It is not alleged that the plaintiffs in the present suit are interested in any portion of the property save the

(1) [1913] 35 All. 445=21 L. C. 617.

2 bighas 12 biswas which were the subject-matter of the suit.

We accordingly reject the application with costs.

V.B./R.K.

Application rejected.

A. I. R. 1915 Allahabad 447

PIGGOTT, J.

Sheo Mangal Singh—Plaintiff—Appellant.

v.

Chedu and others—Defendants—Respondents.

Second Appeal No 1511 of 1914, Decided on 11th November 1915, from decree of District Judge, Mainpuri.

Occupancy holding—Effect of mortgage—Mortgage with possession before Tenancy Act—Mortgagor cannot relinquish tenancy for consideration.

An occupancy tenant who prior to the coming into force of the Agra Tenancy Act, 1901, mortgaged his holding for consideration and in a genuine way, and put the mortgagee in possession, cannot enter into a bargain with his zamindar so as to secure some collateral advantage for himself as consideration for the relinquishment of his holding, to the prejudice of the mortgagee whom he has himself put in possession. [P 448 C 1]

Lakshmi Narain and Baleshwari Prasad—for Appellant.

Sital Prasad Ghosh—for Respondents.

Judgment.—This is plaintiff's appeal in a suit for ejectment originally filed in the Court of an Assistant Collector. The plaintiff is admittedly the zamindar of the land in suit. In his plaint, he describes the two defendants, Chedu, son of Dan, and Chiddu, son of Matru, Kunjras, as non-occupancy tenants of the land in suit. The defendants filed a written statement in which they described themselves as mortgagees in possession on behalf of the tenant-in-chief who was a tenant with occupancy rights. On their plea Mithu, son of Faqira, was added as a defendant. The Assistant Collector came to the conclusion that there had been a mortgage by Faqira, father of Mithu, in favour of the original defendants and that this fact alone was sufficient to oust his jurisdiction. He dismissed the suit accordingly. The District Judge was obviously inclined to the opinion that the Assistant Collector was wrong on the question of jurisdiction. He has however rightly remarked that the question was one which might be passed over in his Court, in virtue of the provisions of S. 197, Agra Tenancy

Act (Local Act 2 of 1901). He was of opinion that he had materials on the record sufficient to determine the appeal. He has found that there was a mortgage by Faqira in favour of the original defendants, and that this fact alone was sufficient to protect the said defendants from ejectment during the period of the mortgage.

The plaintiff's suit having thus been dismissed by both the Courts below, it is contended in second appeal to this Court that the findings of the Court of first appeal are not sufficient to dispose of the case. The facts apparent from the record are somewhat peculiar. It would seem that the land was conveyed to the fathers of the two original defendants by two distinct transactions. There was a mortgage by Faqira in the month of May 1897 in favour of Matru for a period of 15 years. Before this period had expired, Faqira executed another mortgage in favour of Dan for a period of 20 years. The record does not show that Dan and Matru are related, though they are members of the same caste, and it would seem that their sons, the two defendants originally impleaded are amicably in joint possession of the land in suit. After the death of Faqira, there was a suit for arrears of rent against Mithu which resulted in a decree in favour of the zamindar. If the latter had proceeded to eject Mithu for non-satisfaction of this decree, the mortgagees in possession would no doubt have had an opportunity of protecting themselves by paying into Court the amount of the decree money. It is not clear from the record whether any proceedings in ejectment had been commenced, but on 29th January 1911, Mithu relinquished his holding in favour of the plaintiff zamindar. Subsequently, Mithu himself brought a suit to get this relinquishment set aside, on the ground that it, had been brought about by fraud or coercion and this suit failed. The learned District Judge has quoted authority for the position taken up by him, that Mithu was not entitled during the pendency of the mortgage in favour of Dan to relinquish his holding to the prejudice of the latter. It seems to me that there are two currents of opinion in this Court on this question.

The matter came before a Full Bench recently in the case of *Brij Kumar Lal*

v. *Sheo Kumar Misra* (1). In deciding that case, the Court laid stress on certain facts which had been concluded by the findings of the Court below. These were as follows : (1) That the mortgage set up against the zamindar was for consideration and genuine ; (2) that the object of the relinquishment was to defeat the mortgagee's rights. On these findings it was held that the civil Court had rightly granted the mortgagee a declaration that the relinquishment by the tenant was ineffectual against him and an injunction restraining the zamindar from interfering with his possession.

A number of authorities on the point are referred to by Tudball, J, in his order in the case of *Jai Gopal Narain Singh v. Uma Dutt* (2). It is clear that in some of the older cases of this Court, as for instance, *Rannu Rai v. Raffuddin* (3), the position had been broadly taken up that an occupancy tenant who prior to the coming into force of the Agra Tenancy Act (Local Act 2 of 1901), had made a usufructuary mortgage of his holding and put the mortgagee into possession, could not during the subsistence of this mortgage relinquish his holding to the prejudice of the mortgagee's rights. If the principle thus broadly laid down, is accepted as of universal application, it would seem that there was no necessity in the more recent ruling to which I have referred, to discuss such a question as the object of the relinquishment, or the existence of collusion between the mortgagor and the zamindar. I take it that the law is finally settled to this extent: that an occupancy tenant who has mortgaged his holding under the circumstances stated, and put the mortgagee in possession, cannot enter into a bargain with his zamindar so as to secure some collateral advantage for himself as consideration for the relinquishment of his holding, to the prejudice of the mortgagee whom he has himself put in possession. Whether any broader principle than this can be laid down as applicable to all cases, seems to me at least open to argument.

The mortgagees, by refusing or neglecting to pay rent regularly to the zamindar, might obviously put their

mortgagor in a very unpleasant position. It is all very well to say, as has been done in this case, that the mortgagee would be driven in the last extremity to protect the occupancy tenant from ejection by paying into Court the amount of any decree which the zamindar might have obtained against him; but there seems no good reason why the occupancy tenant, while not in possession and not enjoying any benefit from the produce of the land, should be put to the trouble of defending a series of suits for arrears of rent because the mortgagee in possession has not troubled himself to pay the rent regularly. If the conditions of the mortgage were such as to bind the mortgagee to pay rent regularly to the zamindar, I think the Courts might well grant the mortgagor equitable relief against any breach of such condition and permit him to protect himself from further trouble by relinquishing his holding. Without therefore committing myself to any further attempt to define the law on this point, I think I have said enough to justify the conclusion that there should be some further findings of fact recorded, before the decision of the Courts below dismissing the plaintiff's suit can be affirmed.

I have to consider what issues should be remitted. In argument before me it has been suggested that the mortgages in favour of Dan and Matru have not been proved in accordance with law, and that there should be a finding both as to the factum of those mortgages and as to the passing of consideration. It does not seem to me that any plea to this effect can fairly be read into the memorandum of appeal filed by the plaintiff in this Court ; nor do I think it is a plea which I should permit to be raised at this stage. The whole of the proceedings in the Courts below, and the findings of both those Courts, are based on the assumption that the defendants originally impleaded were placed in possession by Faqira, as mortgagees in virtue of a bona fide mortgage or mortgages. As a matter of fact, the period of the mortgage in favour of Matru has expired, so that the only mortgage which can be set up in this case is that of 1901 in favour of Dan. As the case now stands before me, I do not think it necessary or advisable to call for any finding as to whether this mortgage was legally proved

(1) A. I. R. 1915 All. 271=29 I. C. 215=37 All. 444 (F. B.).

(2) [1911] 10 I. C. 578.

(3) [1904] 27 All. 82=(1904) A. W. N. 170.

or was for consideration. I think the Courts below have virtually concluded these points in favour of the defendants.

There remains the question of the transactions connected with Mithu's relinquishment. I remit the following issues to the Courts below :

"(1) In relinquishing his rights as an occupancy tenant over the land in suit, did Mithu obtain for himself any collateral advantage from the plaintiff zamindar, or can it otherwise be said that the plaintiff and Mithu were acting in collusion to the prejudice of the original defendants?"

"(2) Were the original defendants, or either of them, as mortgagees of the land in suit, bound to pay the rent thereof regularly to the zamindar? Were they in any way responsible for the fact that the zamindar obtained a decree for arrears of rent against Mithu?"

As the case has not been looked at in either of the Courts below from the point of view which I have taken, I think that the parties should be permitted to adduce evidence on these issues if they see fit to do so. The lower appellate Court may record itself any additional evidence which the parties may offer, or cause the evidence to be taken by the Court of first instance, but it must record its own findings. On return of the findings, ten days will be allowed for objections.

V.B./R.K. *Issues remitted.*

A. I. R. 1915 Allahabad 449

KNOX, J.

Singer Manufacturing Co.—Plaintiff—Appellant.

v.

Mrs. E. Felyun and others—Defendants—Opposite Parties.

Civil Revn. Petn. No. 46 of 1914, Decided on 26th November 1914, from decree of Small Cause Court Judge, Allahabad.

Limitation Act (9 of 1908), Art. 49—Proof of demand and refusal is necessary to make wrongful detention—Mere nonpayment of rent would not suffice.

The mere nonpayment of rent for a sewing machine taken on the hire purchase system would not amount to wrongful taking or wrongful detention of the machine within the meaning of Art. 49, Limitation Act. There must be some overt act or demand for the machine by the hirer and refusal by the purchaser. 12 C. W. N. 1010 and 12 I. C. 207, *Ref.*; 28 All. 84, *Dist.* [P 449 C 2; P 450 C 1]

Pearcy Lal Banerjee—for Appellant.

Simoon—for Opposite Parties.

Judgment.—This is an application for revision of an order passed by the Judge of the Small Cause Court, Allahabad. The case as laid before the Small Cause

Court Judge briefly is that on 27th January 1908 the defendants, who are the second party in this Court, took a machine from the Singer Manufacturing Company on what is known as the hire and purchase system. The value of the machine is said to be Rs 80 and in the plaint it is alleged that Rs 20 has been paid and the balance, which was under the agreement between the parties to be recovered by monthly instalments of Rs. 5, has not been paid. The last date on which it is said payment of this monthly instalment was made, is put as April 1908. The relief prayed for by the plaintiff was that a decree be passed against the defendants for Rs. 40, rent running from 27th November 1912 to 27th July 1913, and for delivery of the machine or for its value together with costs and future interest. In the reply it was contended that the suit was barred by limitation. There were other pleas, but they are unnecessary for the purpose of this application. The Court below having found that the case was within its jurisdiction went on to hold that the claim was barred by limitation. The articles which the Court below considered were articles barring this claim are Arts 48, 49 and 50, Limitation Act. Holding that the suit was barred the Court below dismissed it. This Court is asked to interfere on the ground that the Court below has entirely failed to appreciate the relation existing between the plaintiff and the defendants who had hired the machine and who are in possession of it on behalf of the plaintiff. It is difficult to understand the reasoning adopted by the learned Judge of the Court below.

In his judgment he says that under Cl. (d) of the agreement entered into between the parties, the owner could terminate the hiring and retake possession of the machine and accessories. He holds that the cause of action accrued when the hirer failed to pay in any month in advance. This failure first took place according to the learned Judge in June 1908 and the suit became barred under Art. 49, Limitation Act, with effect from 27th June 1911. I think the learned Judge has entirely overlooked the conditions of the transaction with regard to this machine. There could not have been any wrongful taking or wrongful detention until there had been some overt act

of wrongful taking or some demand made by the Company and refusal by the defendants. The mere nonpayment of rent would not amount to wrongful taking or wrongful detention. The act of the defendants would appear to fall if it falls at all under this article, under wrongful detention and that act would only begin on the date when a demand for the machine had been made by the Company and refusal by the defendants to deliver it had been set up. This is the view which I take. I am fortified in this conclusion by the view taken under similar circumstances by the Calcutta High Court in *Gopul Chandra Bose v. Surendra Nath Dutt* (1). The learned Judges in that case held that the decision on a point of this kind should be in accordance with the decision in *Wilkinson v. Verity* (2). The Madras High Court took the same view in *Gopalsami Ayyar v. Subramana Sastri* (3). They refused to consider the contention raised in that case that mere silence of the defendant amounted to refusal. This case goes further than the present case. By the opposite side I was referred to *Ram Singh v. Salig Ram* (4). That case really deals with the question of jurisdiction and when a decision in a Small Cause Court case should or should not be interfered with by this Court, and not with limitation. I have no doubt that the decision arrived at by the learned Judge of the Small Cause Court is wrong and cannot be supported. I therefore think that this is a case in which I should interfere with the decision of the Court below. That decision being upon a preliminary point, I set it aside and return the case to that Court with the direction to re-enter it on the file of pending cases and to dispose of it according to law. The second party will pay the costs of the applicant so far as this revision is concerned.

V.B./R.K.

Case returned.

A. I. R. 1915 Allahabad 450

CHAMIER, J.

Shafaatullah—Plaintiff—Appellant.

v.

Izzatullah and others — Defendants—Respondents.

Second Appeal No. 482 of 1914, Decided on 23rd February 1915, from decree of Addl. Judge, Moradabad.

Transfer of Property Act (4 of 1882), S. 95—Redemption in part if agreed upon does not split the mortgage—Coheir redeeming mortgage is entitled to possession and charge on property—Dispossession does not defeat charge.

Where a mortgage-deed provides that the mortgagor might redeem any portion of the property upon payment of a proportionate part of the debt, and some of the heirs of the mortgagor redeem their share in the property, the integrity of the mortgage is not broken up.

[P 451 C 2]

One of the co-heirs of a mortgagor who, being a person interested in the mortgaged property, pays off the mortgage money and redeems the property, is entitled to possession of the property, and the other co-heirs cannot defeat the charge he thereby acquires on the property under S. 95, T. P. Act, by keeping him out of possession.

[P 452 C 1]

Ibn Ahmad—for Appellant.

Mahomed Ishaq Khan, S. M. Sulaiman and Iqbal Ahmad—for Respondents.

Judgment.—The facts of this case are as follows, so far as they have been determined. Many years ago certain property was mortgaged by Mt. Fatehunnissa to the predecessor of defendants 9 to 11. The mortgage was of a usufructuary character and the mortgagee was placed in possession. Some years after the mortgage, Fatehunnissa died leaving four sons. Her first son is represented in this suit by defendants 6, 7 and 8. Her second son is represented by defendants 3, 4 and 13. The third son is represented by defendants 1 and 2 and the fourth son is represented by the plaintiff, Shafaatullah, and defendants 5, 12, 14 and 15. Each branch of the family became entitled to one-fourth of Fatehunnissa's estate, but under an arbitration award each branch got definite properties not necessarily corresponding exactly to its one-fourth share. It was provided in the mortgage-deed that the mortgagor might redeem any portion of the property upon payment of a proportionate part of the debt, and it is said that in the award it was provided that each branch might settle with the mortgagee in respect of its own portion of the property. Defendants 6 to 8 brought a suit for re-

(1) [1908] 12 C. W. N. 1010.

(2) [1871] 6 C. P. 206=40 L. J. C. P. 141=24 L. T. 32=19 W. R. 604.

(3) [1911] 35 Mad. 636=12 I. C. 207.

(4) [1906] 28 All. 84=(1905) A. W. N. 193=2 A. L. J. 711.

demption of that portion of the property which had been allotted to them by the award, but as might be expected, they got a decree for redemption not of the property allotted to them by the award, but of a one-fourth share of the whole. The case of the plaintiff is that, being one of the persons entitled to redeem the mortgage, he has paid to the mortgagee or rather to the mortgagee's representatives the amount remaining due on the mortgage, and in this suit, he claims possession of the remainder of the property, that is, of the mortgaged property excluding what was decreed to defendants 6 to 8 in their suit. The representatives of the mortgagee put in no defence, but the suit was resisted by most of the other members of the mortgagor's family. It appears that when the money was paid by the plaintiff to the mortgagee's representatives the latter surrendered possession and the plaintiff applied for mutation of names. Thereupon many of the other members of the family, including those who have resisted this suit, put in objections, and the result appears to have been that mutation of names was made in favour of all the persons entitled to the property, as if the mortgage had been paid off by all of them. It is, in fact, the case of several of the defendants that each of the different persons entitled to the property contributed his quota of the money paid to the mortgagees, and therefore they say that they are entitled to retain possession.

The plaintiff's case is that he found the whole of the money that was paid to the mortgagees, and therefore he alone is entitled to possession and is entitled to retain possession until the other members of the family pay him what is due on account of their shares. There is also a subsidiary question between the plaintiff on the one side and defendants 6 to 8 on the other. The plaintiff complains that defendants 6 to 8 have taken possession of one fourth of a grove to which they are not entitled under the award. This question may be dismissed from further consideration, with the remark that defendants 6 to 8 have taken possession only of what was decreed to them, and unless and until the plaintiff gets possession of the rest of the property, so that the award may be given effect to, defendants 6 to 8 are entitled

to retain possession of what they have got. Both the Courts below have dismissed the suit, on the ground that the plaintiff was not entitled to redeem more than his share or more than the share of his branch of the family. In my opinion it is quite clear that the plaintiff as one of the persons entitled to the property is competent to redeem the whole mortgage. This is not a case of the integrity of the mortgage having been split up by partial redemption effected by defendants 6 to 8; for what they did was strictly in accordance with the mortgage. They, being some of the persons entitled to the property, might have, if they had chosen, redeemed the whole mortgage, but they took advantage of the clause of the deed referred to above to redeem a portion only, and they were entitled to redeem that portion not because they had inherited any particular share in the property from Fatehunnissa, but because the mortgage deed empowered the mortgagor, and therefore also the mortgagor's representatives or any one of them, to redeem a portion of the property on payment of a proportionate part of the debt. For the same reason it appears to me quite clear that the plaintiff is entitled to redeem the remainder of the mortgaged property, and the reasons given by the Courts below for dismissing the suit appear to me to be unsound. In this Court the same reasons were put forward; but an additional and more serious argument was advanced, namely, that a suit of this character is not maintainable at all.

Section 95, T P. Act has been discussed in several cases in this Court and it has been held that in the case of a mortgage made without delivery of possession, one of several mortgagors redeeming the property is entitled to a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming, and that the words "obtains possession" and "obtaining possession" apply not only to a case of mortgage under which possession has been delivered to the mortgagee. It is admitted that if the plaintiff was entitled to redeem the remainder of the mortgage, and if, having done so, he had succeeded in obtaining possession, he would have been entitled to a charge on the shares of the other members of the fa-

mily. But it is contended that as the other members of the family or some of them have succeeded in preventing the plaintiff from obtaining possession, the plaintiff cannot sue for possession. It seems to me that if this contention is sound, it follows, according to the decisions of this Court, that the plaintiff has not even a charge on the shares of the other members for his proportion of the expenses incurred by him in redeeming the mortgage. (I am assuming, of course, for the present that the whole of the money paid to the mortgagee was found by the plaintiff). The construction of S. 95 advocated by the defendants in his case appears to me to put a high premium on violence. Their argument comes to this: if one of several mortgagors redeems a mortgage, and the mortgagee is ready and willing to hand over possession to the person who pays him the mortgage-money, yet if the co-mortgagors can succeed by force or otherwise in preventing the person who paid the money from taking possession of the property, their shares in the property are freed from all liability for their proportion of the mortgage money. Neither side has been able to cite any authority on the subject; but it seems to me that the plaintiff, being a person interested in the property and having paid to the mortgagees what remained due to them, was entitled to possession of the property, and that the defendants cannot be allowed to defeat the plaintiff's charge on the property by keeping him out of possession.

But before I can dispose of this appeal, I must have findings on the issues which have not been taken up by the Courts below. I direct that the record be returned to the lower appellate Court in order that findings may be recorded on the issues other than Nos. 3 and 5. Fresh evidence may be admitted. I invite attention to the fifth ground taken in the memorandum of appeal to the lower appellate Court in order that the question raised in that ground of appeal may be considered by the Judge. On return of the findings ten days will be allowed for objections.

V.B./R.S.

Case sent back.

A. I. R. 1915 Allahabad 452

PIGGOTT, J.

Daljit Singh—Defendant—Appellant.
v.

Shambhu Singh—Plaintiff—Respondent.

Second Appeal No. 921 of 1914, Decided on 14th June 1915, from decree of Addl. Dist. Judge, Farrukhabad.

U. P. Land Revenue Act (3 of 1901), S. 233 (k)—Remedy for grievance against mistake in distribution of lands in partition is by way of application and not by civil suit.

Where there has been a partition of a certain mahal by a revenue Court, resulting in a certain distribution of the lands of that mahal, if any error has been made in connexion with this distribution to the prejudice of a particular cosharer, the remedy of the latter is by way of application to the revenue Court to correct its own mistake and not a suit i. the civil Court; 8 I. C. 807, *Foll.* and 23 All. 291 (*F. B.*); (1900) A. W. N. 11 and 1 I. C. 696, *Ref.*

[P 452 C 2]

Gulzar Lal—for Appellant.

Tej Bahadur Sapru—for Respondent.

Judgment.—The question for determination in this appeal is whether this suit was barred by the provisions of S. 233 (k), United Provinces Land Revenue Act, Local Act 3 of 1901. According to that section the civil Court is debarred from taking cognizance of any suit with regard to the partition or union of mahals. The section itself is drawn up in broad terms and it has been applied broadly by this Court ever since the Full Bench decision in *Muhammad Sadiq v. Taute Ram* (1). That decision was under the former Land Revenue Act, 19 of 1873, the wording of which differed somewhat. The provisions of S. 233 (k), as they now stand, were considered by two Judges of this Court in *Lachman Das v. Hanuman Prasad* (2). I understand that ruling as laying down the broad principle that where there has been a partition of a certain mahal by a revenue Court, resulting in a certain distribution of the lands of that mahal being effected, if any error has been made in connexion with this distribution to the prejudice of a particular cosharer, the remedy of the latter is by way of application to the revenue Court itself to correct its own mistake. Any exercise of jurisdiction on the part of a civil Court which would disturb, or in any way affect, the distribution of

(1) [1901] 23 All. 291=(1901) A. W. N. 86 (*F. B.*).

(2) [1910] 33 All. 169=8 I. C. 807.

land made on a partition, is barred by S. 236 (k), Act 3 of 1901. The facts of the present case are given at length in the very careful judgment of the learned Munsif. It appears that the mahal with which we are concerned had been divided by perfect partition in the year 1875. A number of pattis had been formed, one of which pattis, No. 9, was known as patti shamilat, and consisted of those lands which had not been divided amongst the cosharers, that is to say, the joint lands in which all the cosharers of the various pattis retained their rights according to their proportionate shares. In the year 1904 Daljit Singh, who is the defendant in the present case, presented an application for the separation by perfect partition, of his share in pattis Nos. 4 and 5 and also of his share in shamilat patti No. 9. Notice of this application was issued to all the cosharers of all the various pattis in the mahal. The Assistant Collector however came to the conclusion that there were objections to a perfect partition, and intimated as much to Daljit Singh. The latter thereupon presented a fresh application on 25th March 1905, asking the Court to separate his share by imperfect partition only, thus forming it into a new patti. The learned District Judge seems to have felt some doubt as to whether on this application any actual partition of the lands appertaining to the shamilat patti No. 9 could have followed, or actually did follow.

Obviously, when Daljit Singh's application was limited to one for imperfect partition, no actual partition of the lands appertaining to the patti shamilat would follow. A new patti would be created by separating Daljit Singh's share in lands appertaining to pattis Nos. 4 and 5 from those of the other cosharers in the same pattis. In the course of carrying out this imperfect partition the Assistant Collector laid hold of a plot '69, '69 of an acre in area, shown as No. 1956 in the village map. He treated this as appertaining to patti No. 4 and divided it amongst cosharers of that patti, assigning to the defendant-appellant '49, '49 acre as his share in the same. The plaintiff in this case, Shambhu Singh, has acquired since the partition the proprietary rights which belonged in the years 1904 and 1905 to a cosharer

named Dular Singh. He contends that plot No. 1956, above referred to, never appertained to patti No. 4 at all, but formed part of the land appertaining to patti No. 2 in which Dular Singh was a cosharer. He suggests that the proceedings of the Assistant Collector dealing with this plot in the course of the partition of 1905 were a pure mistake.

The Courts below have gone into the question of fact. Apparently it was not a question which could be settled off-hand on a mere inspection of the village records. It turned upon a comparison of the existing village records with the older papers and the ascertainment and location of the older numbers which went to make up plot No. 1956 in the present village map. The Courts below have however found that plot No. 1956 did appertain to patti No. 2 and was wrongly included by the Assistant Collector in patti No. 4 and partitioned amongst the cosharers of that patti. Assuming that this finding is correct, the plaintiff has suffered an injury but the question remains whether his remedy is by way of suit in a civil Court or, as was said in the ruling to which I have already referred, by way of application to the revenue Court to correct its own mistake. Both the learned Munsif and the learned District Judge have taken the view that the case stood on an entirely different footing from the moment that Daljit Singh applied to the revenue Court to separate his share from the rest of the mahal by imperfect instead of by perfect partition. It certainly cannot be denied that, if the proceedings had continued on the application for perfect partition as originally brought, and the Assistant Collector had however erroneously, taken this plot of land and divided it amongst the cosharers in patti No. 4, a suit would not have been maintainable in the civil Court to disturb that apportionment. I understand the District Judge to mean that the sharers in the remaining pattis, other than pattis Nos. 4 and 5, ceased to have any interest in the partition, or to be under any obligation to watch the proceedings in the Assistant Collector's Court, from the moment that Daljit Singh's application was limited to an application for imperfect partition. The only reported case I can find which lends some support to the decision of the Courts below

is that of *Kishin Prashad v. Kadher Mal* (3), which was a single Judge case. So far as I can discover from the reported cases of this Court it has only once been considered by a Bench of this Court, and that was in *Jagan Nath v. Tirbeni Sahai* (4).

It was then distinguished against, though not expressly dissented from. It seems to me that the plaintiff is not entitled, in the present case, to ask the Court to treat the Assistant Collector's proceedings as a nullity. On Daljit Singh's application for partition the Assistant Collector had to ascertain what lands belonged to pattis Nos. 4 and 5 and to apportion them between the recorded cosharers of the said pattis. He would have to do this equally on an application for imperfect partition as on an application for perfect partition. It may be that the Assistant Collector came to an erroneous decision when he included this plot, No. 1956, in the area which he proceeded to apportion amongst the cosharers of patti No. 4. Nevertheless he did so, and it seems to be impossible to say that he had no jurisdiction to do so. This case is really distinguishable from that of *Kishan Prashad v. Kadher Mal* (3), because in the present case all the cosharers in the shamilat patti, including the proprietors of patti No 2, had notice of the partition proceedings. I am not sure that I should myself have been disposed to regard this as in itself decisive, but it seems to me that I am bound to follow the general principle laid down in *Lachman Das v. Hanuman Prasad* (2), unless something can be shown to take the case before me outside the operation of that principle. In my opinion this appeal must succeed. The suit was not cognizable by reason of the provisions of S. 233 (k), Land Revenue Act, and should have been dismissed accordingly. I accept this appeal, and setting aside the decrees of both the Courts below dismiss the plaintiff's suit with costs throughout.

V.B./R.K.

Appeal decreed.

A. I. R. 1915 Allahabad 454

TUDBALL, J.

Lachman Das—Plaintiff—Appellant.

v.

Muhammad Yusuf and others—Defendants—Respondents.

Second Appeal No. 1010 of 1914, Decided on 11th June 1915, from decree of Addl. Judge, Farrukhabad.

Contract Act (9 of 1872), S. 23—Exchange of house for expropriary holding is illegal—House cannot be recovered

An exchange of a house for the expropriary right of a holding is an illegal transaction and the owner of the house is not entitled to maintain a suit for recovery of possession of the house. [P 455 C 1]

Surendro Nath Sen—for Appellant.

S. M. Sulaiman—for Respondents.

Judgment.—The facts of the case out of which this appeal has arisen appear to be as follows : One Ram Ratan Lal obtained a decree against the defendants and in execution of that decree he attached and sold the house which is in dispute in the present suit. It was purchased in the name of Lachman Das, who is connected in some way with Ram Ratan Lal. It appears that after the sale Ram Ratan Lal and the auction-purchaser had a considerable amount of difficulty in getting possession of the house from the judgment debtors; finally, on 22nd September 1905, a document was executed by both sides under which Ram Ratan Lal and Lachman Das transferred the ownership of this house to the defendants, while the defendants in return transferred to them their expropriary rights in a certain holding. This holding included a large number of plots of land. As far as one can see the parties acted up to their word, possession of the house was given to the defendants and possession of the holding was given to Ram Ratan Lal and Lachman Das. Subsequent to this there was a difference about a grove. The defendants owned a grove and in execution of a decree the whole of the grove was attached, sold and purchased by Lachman Das. Under the decree however it was only a portion of the grove that ought to have been sold. The defendants thereupon brought a suit to recover possession of the excess amount which ought not to have been sold. In the course of that suit Lachman Das pleaded the exchange of 22nd September 1905, this grove apparently standing on one of the plots in which the de-

(3) [1900] A. W. N. 11.

(4) [1909] 31 All. 41=1 I. C. 696.

defendants had held exproprietary rights. In that case the Court held that the transfer was an illegal transfer and was not binding on the defendants and the defendants got a decree for possession of that portion of the grove. The plaintiff Lachman Das has now brought the present suit for possession of the house. In his plaint he said nothing about the deed of exchange or anything else. He has come forward as an auction-purchaser and says that, though formal possession was delivered to him, he has failed to obtain actual possession of the property sold, and on the basis of his title as auction-purchaser he claims possession of the house. Both the Courts below have held that the plaintiff has no right to regain possession of the house. On behalf of the plaintiff it is urged before me that he is quite willing to be put upon terms, that if he can get the house back, he would be quite willing to retransfer the exproprietary holding. This was not what he stated in his plaint. The question is whether he is entitled to get back the house. It is quite clear that if he had purchased the exproprietary right, he would not have been entitled to recover the money by suit. The deed of 22nd September 1905 was practically a sale deed, though, instead of cash, property was given in exchange for property.

The fact that the transaction was an exchange and not a sale makes little difference in the application of the principle on which the cases in this Court have been decided. The transfer of exproprietary rights is forbidden by law. The plaintiff has purchased property the sale of which he must have known was forbidden by law. The property has been handed over since by the vendor and he is not entitled to recover back his house, much more so in the present case, because it will be impossible to re-place the opposite party in the same position in which he was before the transaction was carried out. That was ten years ago. For ten years they have been out of possession of this exproprietary holding and the landlord of the village would probably object to their returning as exproprietary tenants, they having been out of possession for so many years. The plaintiff has nobody but himself to thank, and I cannot see my way to helping him. Under the circumstances I hold that he is legally not entitled to recover possession

of the house. The appeal therefore fails and is dismissed with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 455

CHAMIER AND PIGGOTT, JJ.

Munni Lal—Appellant.

v.

Bhagwandas—Respondent.

First Appeal No. 61 of 1924, Decided on 5th November 1914, from decision of District Judge, Benares, D/- 19th March 1914.

Provincial Insolvency Act (3 of 1907), Ss. 11 (d) and 15—Inclusion of bogus debts in schedule is alone no ground for dismissal of insolvency petition.

Where an applicant is in fact insolvent, his application should not be dismissed merely because he mentions some bogus debts in the schedule of liabilities given with the application.

If he has been guilty of any act of bad faith in drawing up the schedule he can be suitably dealt with at a later stage by the District Judge under the provisions of the Insolvency Act.

[P 455 C 2]

Harnandan Prasad—for Appellant.

S. N. Sen—for Respondent.

Order.—This is an appeal by one Munni Lal whose application to be adjudicated insolvent has been dismissed by the learned District Judge of Benares. The insolvency application showed assets amounting to a little over Rs. 800 and liabilities exceeding Rs. 1,800. The principal debt stated was one due to the respondent Bhagwan Das which the applicant stated at Rs. 1,300. From the evidence on the record it would appear that the amount due to Bhagwan Das now exceeds the sum of Rs. 1,500. The application has been dismissed by the District Judge upon a finding that the other smaller debts shown in the schedule of liabilities were bogus debts put in for the purpose of swelling the amount of applicant's nominal liabilities. Seeing that upon the uncontroverted facts of the case the applicant was hopelessly insolvent in respect of the debt due to Bhagwan Das alone the above does not seem to be a satisfactory reason for dismissing his application. If he has been guilty of any act of bad faith in drawing up the schedule of liabilities he can be suitably dealt with at a later stage by the District Judge under the provisions of the Insolvency Act. We allow this appeal set aside the order of the Court below and direct

the District Judge to re-admit the application and to dispose of it in accordance with law. The appellant will have his costs of this appeal.

V.B./R.K. *Order set aside.*

A. I. R. 1915 Allahabad 456 (1)

CHAMIER, J.

Prag—Applicant.

v.

Emperor—Opposite Party.

Criminal Revision No. 384 of 1915, Decided on 18th June 1915, from order of Sessions Judge, Allahabad.

U. P. Excise Act (4 of 1910), Ss. 60 and 70
—Police officers being invested with powers of Excise Officers under S. 10 can lodge complaints under S. 60

Police officers being invested with powers under S. 10, U. P. Excise Act, are Excise Officers and a Magistrate can take cognizance of an offence under S. 60, United Provinces Excise Act, 1910 on the report of a police officer in charge of a police station. [P 456 C 1, 2]

Hamilton—for Applicant.

Assistant Government Advocate—for the Crown.

Judgment.—The applicant has been convicted under S. 60, United Provinces Excise Act of 1910 of having cultivated hemp plants and also of having sold them. He was sentenced by the Magistrate to one month's rigorous imprisonment and to a fine of Rs. 100 or in default to one month's imprisonment more. On appeal the Sessions Judge confirmed the conviction and the sentence of imprisonment but reduced the fine to Rs. 50. It is contended on behalf of the applicant that the Court had no jurisdiction to entertain the case. Counsel referred to S. 70 of the Act, which provides inter alia that no Magistrate shall take cognizance of an offence punishable under S. 60 except on his own knowledge or suspicion or on the complaint or report of an Excise Officer. This case is said to have been started on the report of an Excise Officer. The report in question was made by the police officer in charge of the Cantonment Police Station. Under S. 3 of the Act "excise officer" includes any person invested with powers under S. 10 of the Act. Under Notification No. 576 of 13th July 1910, all police officers in charge of stations amongst other persons were invested with the powers specified in S. 50 of the Act in respect of offences punishable under S. 60, Cls. (b), (c), (d), (f) and (i). The conviction in this case was under Cls. (c) and (d). It is therefore clear that the police officer who made the report on which the Magistrate took cognizance of this case was an Excise Officer within the meaning of S. 10. I hold therefore that the Magistrate had jurisdiction to take cognizance of the case. On the merits I have no doubt that the conviction was right. It was clearly proved that the applicant had cultivated, that is to say, had tended and watered at least if not sown hemp plants in the Macpherson Park, Allahabad, and also that he sold some plants to two men who were sent into the park by the police for the purpose of catching him. The applicant has served a considerable portion of the sentence of imprisonment inflicted on him. I do not think it necessary to send him back to prison for a few days. I therefore reduce the sentence of imprisonment to the term already undergone by him and he need not surrender to his bail. In other respects I dismiss the application. The sentence of fine and of imprisonment in default of payment of fine will stand.

V.B./R.K. *Application dismissed.*

A. I. R. 1915 Allahabad 456 (2)

CHAMIER AND PIGGOTT, JJ.

Himat Singh and another—Defendants—Appellants.

v.

Hulas Singh and others—Plaintiffs—Respondents.

Second Appeal No. 1416 of 1913, Decided on 6th November 1914, from decision of Sub-Judge, Budaun.

Agra Tenancy Act (2 of 1901), S. 22
—Nephews, separate, cannot succeed widow if her husband died before the Act

S died prior to the passing of the Agra Tenancy Act (2 of 1901) leaving a widow K. K succeeded to the occupancy-holding left by S. K died after the passing of the Act.

Held: that the plaintiffs, who were the nephews of S and were not in joint cultivation with him, could not succeed to the holding after the widow's death. [P 457 C 1]

P. L. Banerji—for Appellants.

Gulzari Lal—for Respondents.

Judgment.—Sanwant Singh died before the passing of the Tenancy Act, 1901, leaving a widow Kamla Koer. The widow died a short time ago. According to the plaintiffs they got possession of the occupancy-holding and were dispossessed by the defendants. This is a suit for recovery of possession of the occupancy-

holding. Very difficult questions have been propounded under S. 22, Tenancy Act. In the present case it is sufficient to say that, under no possible construction of that section, are the plaintiffs entitled to this holding. They are nephews of Sanwant Singh. It has been found that they were not joint in cultivation with Sanwant Singh and are not collateral relations of Kamla Koer. In any view the decree of the Courts below is wrong. We allow this appeal, set aside the decree of the Courts below and dismiss the plaintiffs' suit with costs in all Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 457

TUDBALL, J.

Bhole Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 459 of 1915, Decided on 4th August 1915, from order of District Magistrate, Jalaun.

Criminal P. C (5 of 1898), S. 476—Village headman explaining reasons for resignation made allegation against police—Magistrate recorded statements—Allegations and statements found on inquiry by police to be false—Held allegations in explanation were not complaint—Statements also were not in judicial proceedings—No action under S. 476 lay.

P, a village headman, made a petition to the District Magistrate in which he stated that he wished to resign his post as headman. On enquiry by the District Magistrate as to the reason of his resignation he stated that during the course of a police investigation in a dacoity case, the police were forcing a large number of people to pay money to them. The Magistrate reduced his statement to writing and sent for the persons named by him. The Magistrate recorded the statements of all of them on oath and sent the case to the Police Superintendent to take action under para 283 of the Police Regulations. The Superintendent reported that the allegations were entirely false. The District Magistrate then ordered the prosecution of *P* and other persons whom he had examined on oath for giving false evidence.

Held. that the statement made by *P* to the District Magistrate was not a complaint, nor the action taken by the Magistrate was in the course of a judicial proceeding, in the course of which he was legally empowered to administer an oath, and that therefore the Magistrate had no power to take action under S. 476, Criminal P. O. [P 458 C 2]

Peare Lal Banerji—for Applicant.

R Malcomson—for the Crown.

Judgment.—The present application has arisen from the following facts: One Paras Ram, a village headman, on 17th February last, filed before the District Magistrate a petition in which he stated

that he wished to resign his post as village headman as he was too old and unable to do his work. The District Magistrate apparently doubted the correctness of the reason given and questioned the man. In reply to questions put to him, the man stated that the police of a certain police station were investigating a dacoity case and in the course of their investigation they were forcing a large number of people to pay money to them, that he was afraid of getting into trouble through this matter and he therefore wished to resign. The District Magistrate in his explanation states that he treated this as a complaint and he thereupon put Paras Ram on oath and examined him again. What he stated was then reduced to writing. On completion of his statement, the Magistrate gave a rubkar to a chaprasi of his Court, which contained the names of 12 persons, and in this he directed the aforesaid chaprasi to produce the persons named therein before him at once. Apparently the chaprasi obeyed orders and produced all these persons. These persons are those whose names were mentioned by Paras Ram in the course of his statement as being connected in some way or other with the alleged extortion. The District Magistrate then recorded the evidence of all these persons on oath.

Having proceeded so far, he then sent the papers to the Superintendent of Police with directions to him to take action under para. 383, of the Police Regulations. This paragraph lays down that before a Superintendent punishes any police officer departmentally or prosecutes him criminally, he must make an inquiry, reduce the substance of the accusation to the form of a charge and record the officer's explanation using a certain form. After completing these proceedings, if he considers that further steps should be taken, he should decide whether the officer ought to be criminally prosecuted or departmentally punished. If he decides to institute a prosecution, he must send the papers to the District Magistrate, and obtain his concurrence before taking further action, whatever the rank of the officer accused may be. The Superintendent of Police made an inquiry and submitted a report to the District Magistrate to the effect that the allegations of extortion were entirely false, and sug-

gested that the person who had made them, and reported them, should be criminally prosecuted. Thereupon the District Magistrate passed an order purporting to be one under S. 476, directing the prosecution of the present applicants and certain others including Paras Ram, the latter to be prosecuted for an offence under S. 211, the others to be prosecuted for offences under S. 193, I. P. C.

It is against this action of the District Magistrate that the present revision has been presented. It is contended, and I must say with considerable force, that Paras Ram made no complaint; that he did not intend to make any complaint; that he called no witnesses and the proceeding before the District Magistrate was not a judicial proceeding in the course of which he was legally empowered to administer an oath. The explanation of the District Magistrate is that he treated what Paras Ram said, as a complaint and that the enquiry that he made was under S. 202, Criminal P. C. The only unfortunate point in this explanation is that a complaint means an allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person has committed an offence. It is not open to the District Magistrate to treat this petition and statement of Paras Ram as a complaint whether Paras Ram liked or not. It may be of course that Paras Ram wished to make a complaint in such a form that if subsequently it was found to be false, he should be able to save himself from a criminal prosecution. If there was evidence in the case to indicate that Paras Ram intended the Magistrate to take action under the Code against the police officers, I should not hesitate for an instant in holding that the Magistrate had power to treat the petition as a complaint and that he was justified in sending for the witnesses and examining them on oath. But an examination of the record shows that Paras Ram's petition was simply a petition tendering his resignation; that even in his statement taken on oath, which statement was made in reply to questions put by the District Magistrate, he made allegations of fact and at the end stated that these were his reasons for resigning his post.

He nowhere asked for the witnesses to be summoned. He nowhere asked for an inquiry to be made, and I may add that

if the Magistrate was knowingly acting under S. 202, it is curious that on completion of his inquiry he should send the complaint to the Superintendent of Police with a view to the latter officer taking action under para. 383, of the Police Regulations. It is also curious that up to the present time the District Magistrate has passed no order dismissing the complaint. Looking at the circumstances of the case, I find it impossible to hold that Paras Ram made a complaint to the District Magistrate; that is to say, that the allegation was made with a view to the Magistrate taking action under the Criminal Procedure Code against the police officers who were said to have committed the extortion. Paras Ram may perhaps have given false information to the District Magistrate in reply to his questions. The point which I have to decide is whether or not there was a complaint, within the true meaning of the word, before the District Magistrate. In my opinion there was no such complaint. The action of the Magistrate was not action taken under S. 202 of the Code. It was apparently executive action in the form of a departmental inquiry which was continued by the further inquiry made under para. 383, of the Police Regulations. There was no judicial proceedings before the District Magistrate and therefore he had no power to take action under S. 476, and the present applicant is one of those whose prosecution for perjury has been directed, and it cannot be said that he committed perjury in the course of a departmental inquiry. No oath ought to have been administered to him at all. I would point out that throughout the inquiry made by the District Magistrate, he nowhere mentioned that he was taking action under any specific section. If, as the District Magistrate says, the unfortunate police officers will not have an opportunity of clearing their character, they will have only the District Magistrate to blame for their unfortunate position, though perhaps it is still open to the District Magistrate to prosecute Paras Ram for giving false information. I allow the application, set aside the order of the District Magistrate and quash the proceedings.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 459 (1)

TUDBALL, J.

Budhi Mal and another—Plaintiffs—Appellants.

v.

Bhati and others—Defendants—Respondents.

Second Appeal No. 949 of 1914, Decided on 9th June 1915, from decree of Addl. Judge, Meerut.

Landlord and Tenant—Expropriatory tenancy—Appurtenance—Meaning of appurtenance explained—House before acquisition of tenancy is not appurtenance—Its mortgage is valid—Agra Tenancy Act (2 of 1901), Ss. 20 and 31.

An appurtenance is something belonging to another thing as principal and passing as an incident to it. It is an appendage, an adjunct, an accessory, or something annexed to another thing more worthy.

Where a house was in occupation of a person long before he became an expropriatory tenant or acquired an occupancy tenancy in the village in which the house was situate, it is not an appurtenance to either of the holdings and its mortgage is not illegal. [P 459 C 2]

Iqbal Ahmad—for Appellants*Shamnath Mushran*—for Respondents.

Judgment.—This appeal arises out of a suit for sale on the basis of a simple mortgage deed dated 8th January 1902. The mortgagor was one Ismail and the mortgaged property is a house which he longed him. Ismail was admittedly once a zamindar of the village when he built this house and lived in it. He subsequently lost his proprietary rights and became expropriatory tenant of his *sir* lands, and his successors also admittedly acquired occupancy rights in certain other land. The Court of first instance decreed the suit. The lower appellate Court has dismissed the suit on two grounds: the first was that the mortgage was illegal and contrary to law and therefore not binding on the mortgagor, and, secondly, on the ground that under S. 60, Cls. (a) and (c), Civil P. C., the house cannot be sold. The second ground is clearly met by the decision of this Court in *Bhola Nath v. Kishori* (1). This is not a case of attachment and sale. It is a question of a decree for sale under a mortgage. In regard to the other ground, the learned District Judge has held that because Ismail lived in this house, this house was an appurtenance to his expropriatory holding and to his occupancy holding, and that as under the Tenancy Act an expropriatory or an occupancy

(1) [1911] 34 All. 25=11 I. C. 646 (F. B.)

holding cannot be mortgaged, therefore the mortgage of this house was contrary to law and illegal. In the first place the facts of this case seem to me to show clearly that this house cannot in any way be deemed to be an appurtenance to either of the two holdings in question. It came into existence long before either of these two occupancy holdings were acquired. The house was never allotted to Ismail by any landlord or any other person at the time at which his cultivatory holding was allotted to him, nor with the intention that he should reside therein so as to enable him to carry on his occupation as a cultivator. An "appurtenance" in common parlance and legal acceptation is something belonging to another thing as principal and passing as an incident to it. It is an appendage, an adjunct, an accessory or something annexed to another thing more worthy. I quote this from Webster's International Dictionary. In my opinion, in the circumstances of the present case, it is impossible to say that Ismail's house was an appurtenance to either of his holdings and that therefore the mortgage of this house is contrary to law. If a mortgagor, such as the present defendant, seek to go behind his solemn word and promise, and to prove that the act done was illegal or contrary to law and therefore not binding upon him, it is for him to prove the facts clearly and beyond doubt. Merely to prove that Ismail lived in this house, and that he was a cultivator, is insufficient to prove that the house was an appurtenance to the holding and therefore could not be mortgaged by him. In my opinion the decision of the Court below is contrary to law and certainly leads to injustice. I allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

V.B./R.K.

*Appeal allowed.***A. I. R. 1915 Allahabad 459 (2)**

KNOX, J.

Gurprasad Singh and others—Plaintiffs—Appellants.

v.

Ram Samajh Singh and others—Defendants—Respondents.

Second Appeal No. 1599 of 1914, Decided on 28th July 1915, from decree of Addl. Sub-Judge, Gorakhpur.

Limitation Act (9 of 1908), S. 5—S. 5 should be liberally construed where negligence, inaction or mala fides is not imputed.

The words "sufficient cause" in S. 5, Lim. Act should receive a liberal construction so as to advance substantial justice where no negligence, inaction or want of bona fides is imputable to the appellant [P 460 C 9]

Where a memorandum of appeal was accompanied not by a copy of the decree appealed against but by a copy of a decree in a connected case and where the whole procedure in the case, so far as the appellant was concerned, was slack to the utmost extent:

Held: that there was not sufficient cause for not presenting the appeal within the period of limitation and that therefore S. 5, Limitation Act, did not apply. [P 460 C 1]

Narmadeshwar Prasad Upadhyay or Surendra Nath Sen—for Appellants.

Jang Bahadur Lal—for Respondents.

Judgment.—A copy of the decree appealed against has now been put upon the record. It was filed before this Court on 30th July 1915, and I understand that when it was filed there was no explanation supported by an affidavit or otherwise as to the reason why it was filed so long after the time granted in the Limitation Act. The ordinary time for the filing of this appeal expired a few days after 1st November 1914. As I have shown in my order of 28th July 1915, the memorandum of appeal was not accompanied by a copy of the decree appealed against. It was accompanied by the copy of a decree passed in a case with which apparently it was intimately connected, and the fact that the decree, with one exception to which I shall presently refer, was the same as the decree which was passed in this case allows the inference that though there must have been negligence on the part of those who filed the memorandum of appeal, yet that negligence was one which might easily have occurred. But when one turns to the final words of the decree it will be found that the decree in the present case, namely No. 65/78, differs 'toto caelo' from the decree which was passed in Case No. 78/65. Whoever is responsible for the preparation of the papers constituting the memorandum of appeal must have done so in such a perfunctory manner that the Court is unable to hold that the appellants had sufficient cause for not presenting the appeal within the period of limitation prescribed therefor. This view of the case is strengthened when it appears that on 3rd November 1914 the appellants applied to the Court

below for a copy of the decree and the copy of the decree was given on the same day. Even if the mistake had not been noticed before, it is difficult to understand how it was that when this copy was procured the mistake was not discovered. The learned vakil for the respondents, in support of his preliminary objection, refers me to the case of *Gulab Devi v. Shanker Lal* (1), in which an appeal was admitted by a District Judge acting on a mistaken report of his office. The learned Judges in connexion with this observe that the Judge did not admit the appeal under S. 5, Lim. Act 1877, and could not have done so, as there were no materials before him by which the appellant could have satisfied him that the appellant had sufficient cause for not presenting the appeal within the period of limitation. While it is true that the words "sufficient cause" in S. 5, Lim. Act, should receive liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fides is imputable to the appellant: see *Rakhai Chandra Ghose v. Ashutosh Ghosh* (2) I find it quite impossible in the present case to hold that there has been no negligence, nor inaction, nor want of bona fides on the part of the appellants. The whole procedure in the case, so far as the appellants are concerned was slack to the utmost extent. They now propose to file an affidavit. If I give them permission to do that I should be encouraging slackness. The preliminary objection must be allowed, and is allowed. This appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1892] A. W. N. 47.

(2) [1913] 19 I. C. 931.

A. I. R. 1915 Allahabad 460

CHAMIER AND PIGGOTT, JJ.

Ram Lal and another—Defendants—Appellants.

v.

Tirbeni Sahai and another—Plaintiffs—Respondents.

First Appeal No. 83 of 1914, Decided on 23rd November 1914, from order of Addl. Dist. Judge, Gorakhpur, D/- 13th February 1914.

Civil P. C. (5 of 1908), O. 41, Rr. 23 and 25—Appellate Court not reversing finding but thinking that finding can be arrived at on

different issue should follow R. 25 and not R. 23.

Where an appellate Court does not definitely reverse the finding of the first Court that the suit was barred by limitation, but is of opinion that in the event of a finding that a certain person was not in possession on a particular date, the suit was still liable to be dismissed on the ground of limitation, the proper procedure for the appellate Court to adopt is to proceed under O. 41, R. 25, and not under O. 41, R. 23.

[P 461 C 2]

Jang Bahadur Lal—for Appellants.
Farmeshwar Dayal for *Iswar Saran*—
for Respondents.

Judgment.—This was a suit in which the plaintiffs claimed possession of certain property, alleging that it had belonged to one Gopal Baksh, who mortgaged it with possession in the year 1896; that the plaintiffs had redeemed that mortgage and had entered into possession, but had been dispossessed by the defendants. There were a number of defences raised, including a denial that Gopal Baksh had any title to the property in suit in the year 1896. The first Court framed four issues. We are at present concerned with the first of them. One of the pleas in defence was to the effect that the defendants had been in adverse possession for more than 12 years prior to the institution of the suit. The learned Subordinate Judge framed an issue on this point and proceeded to discuss the evidence. The parties were at issue on a question of fact, as to whether the plaintiff had or had not obtained possession after the date of the alleged redemption of the mortgage of 1896. On this point the first Court found against the plaintiffs and held that the defendant had in fact been in possession for more than 12 years prior to the institution of the suit.

The learned Subordinate Judge expressly declined to go into the question whether Gopal Baksh was in possession in the year 1896, that is to say, at the date of his mortgage. On appeal the learned Subordinate Judge differed from the view of law taken by the first Court. He remarked that, if Gopal Baksh was in fact in possession at the date of his mortgage, time would not begin to run against him, or any person claiming through him, merely because of the fact that the mortgagees whom he had put in possession might have been dispossessed by a trespasser. He therefore came to the conclusion that the first Court's finding on the

question of limitation could not be maintained on the ground on which it proceeded, and the question whether Gopal Baksh was or was not in possession in 1896 at the date of the mortgage was one which required to be determined before the issue as to limitation was decided. Having come to this conclusion, the lower appellate Court did not proceed to examine the evidence itself, as it might well have done, and come to a finding with regard to Gopal Baksh's possession. The lower appellate Court should have either affirmed or definitely reversed the finding of the first Court on the issue of limitation. As a matter of fact the learned Additional Judge, purporting to act under O. 41, R. 23, has remanded the case to the Court of first instance for trial on the merits. This procedure was not justified by O. 41, R. 23, for the lower appellate Court has not definitely reversed the finding of the first Court that the suit was barred by limitation.

On the contrary the learned Additional Judge was clearly of opinion that in the event of a finding that Gopal Baksh was not in possession in 1896, the suit was still liable to be dismissed on the ground of limitation. Under the circumstances we are of opinion that if the lower appellate Court was not prepared to come to a finding itself on the question of Gopal Baksh's possession at the date of the mortgage, it should have exercised its powers under O. 41, R. 25, to remit an issue. This might have been done with a further direction that findings should also be recorded on the remaining issues in the case, in the event of the Court's finding in favour of Gopal Baksh's possession. In taking this view we are fully supported by the procedure set by a Bench of this Court in *Habib-ullah Khan v. Lalta Prasad* (1). We set aside the order of remand under appeal. We send the record back to the Court of the Additional Judge and direct him to re-admit the appeal to his file of pending cases and to dispose of it according to law with due regard to the remarks made above. Costs here and hitherto will abide the result.

V.B./R.K

Order set aside.

(1) [1912] 34 All. 612=17 L. C. 94.

A. I. R. 1915 Allahabad 462

RICHARDS, C. J.

Kalka Prasad—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 635 of 1915, Decided on 23rd September 1915, from order of Sess. Judge, Banda.

Criminal P. C. (5 of 1898), Ss. 222 (2) and 233—Joint charge of breach of trust and falsification of accounts is illegal—Penal Code (45 of 1860), Ss. 409 and 477-A.

The charge against the accused was that he, being the tahvildar, embezzled a certain sum of money and further that he omitted to enter 120 arzrisals with intent to defraud, and wrote on three of such arzrisals false numbers with like intent. He was tried at one trial for all these counts and convicted under Ss. 409 and 477-A, I. P. C.

Held: that there was misjoinder of the various charges amounting to an illegality which vitiated the trial. [P 462 C 2]

Peary Lal Banerji and *K. N. Laghate*—for Appellant.

Lalit Mohan Banerjee—for the Crown.

Judgment.—Kalka Prasad was charged with offences under Ss. 409 and 477-A, I. P. C. He was sentenced to seven years' rigorous imprisonment under S. 409 and to three years' rigorous imprisonment under S. 477-A together with a fine of Rs. 4,000, the sentences to run concurrently. Kalka Prasad has appealed and it has been argued on his behalf that there was a misjoinder of charges, contravening the provisions of S. 233, Criminal P. C., which provides that (save as therein mentioned) there shall be a separate charge for every offence and that every such charge should be tried separately. The charge in the Court below against the accused was that he being the Tahvildar, embezzled a sum of Rupees 3,991-7-11 and further that he omitted to enter arzrisals Nos. 1-120 with intent to defraud, and wrote on three of such arzrisals false numbers with like intent. The allegation is that it was his duty when receiving money, to take a form of tender from the person paying him the money. This document is called an arzrisal. He has to enter in his book the particulars contained in the arzrisal. It is alleged that in order to cover his defalcations he omitted to make these entries in respect of arzrisals Nos. 1-120, and that with like intent, he put false numbers on three of these documents. It is contended on behalf of the accused

that while having regard to the provisions of S. 222, Cl. 2, Criminal P. C., it is allowable in the charge to state the gross sum which has been misappropriated, there is no similar provision which permits more than three charges under S. 477-A to be joined together. It is contended that the accused (if the allegations of the prosecution are true) committed a separate offence every time he omitted to enter the particulars of each one of the arzrisals in his book. It is further contended that the joinder of the count for misappropriation with the count for falsification is contrary to law inasmuch as the charge or charges under S. 477-A are connected with alleged defalcations more extensive than the charge under S. 409. Reliance is placed upon the recent ruling of their Lordships of the Privy Council, in which it was held that the joinder of charges in contravention of the provisions of S. 233 is something more than an irregularity and vitiates the trial. I think the contention has force.

Supposing in the present case there had only been charges under S. 477-A, it seems to me that there would have been a misjoinder of charges. The omission to enter the particulars of the arzrisals in the book of the accused, was for the purpose of concealing the alleged misappropriation of a distinct sum in each case. As the law stands only three such offences can be joined and tried at the same trial. In this respect charges under S. 477-A, differ from charges under S. 409. I do not think that S. 235 applies. The case was not that of making a number of false entries in various books, etc., to conceal one misappropriation. No doubt there was a similarity in the acts alleged to have been committed by the accused, and it is alleged that the transactions all took place within three days. Nevertheless it seems to me that if the accused did what he was charged with, he committed a separate offence on each occasion for which he was liable to a separate conviction and sentence. Notwithstanding that I consider that the accused was in no way prejudiced by the way in which the charges were framed, nevertheless, there was in my opinion an illegality which vitiates the trial. I accordingly allow the appeal, set aside the conviction and sentence and direct that there be a

new trial after charges have been framed according to law.

V.B./R.K.

Retrial ordered.

A. I. R. 1915 Allahabad 463

CHAMIER, J.

Abdul Qayum—Plaintiff—Appellant.

v.

Fida Hussain—Defendant—Respondent.

Second Appeal No. 1214 of 1914, Decided on 1st July 1915, from decree of Addl. Sub-Judge, Bareilly.

(a) Evidence Act (1 of 1892), S. 115—Objection to jurisdiction of Revenue Courts estops objector in raising same objection in civil Court—Practice, Inconsistent plea.

Where in a suit brought in a Revenue Court the defendant pleads that the suit is not cognizable by the Revenue Court, he is precluded from raising a similar plea in the civil Court when the suit is brought in that Court.

[P 463 C 2]

(b) Agra Tenancy Act (2 of 1901), S. 58—Ejectment suit against tenant from pasture land is cognizable by civil Court.

A suit for the ejectment of a tenant from pasture land is cognizable by a civil Court.

[P 463 C 2]

Gokul Prasad—for Appellant.

Gulzar Lal—for Respondent.

Judgment.—The appellant sued in a revenue Court for the ejectment of the respondent from plots Nos. 659 and 661. The Assistant Collector decreed the claim as regards No. 661, but dismissed it as regards No. 659 on the ground that the respondent had acquired a right of occupancy therein. The appellant appealed to the Commissioner who, after holding that the land had been originally let at a light rent for pasturage, and had only recently been cultivated by the respondent, ruled that the suit did not lie in a Revenue Court for the ejectment of a tenant from such land, and that the appellant's proper course was to give the respondent notice to quit, and if he did not comply with it, to sue him in the civil Court. The appellant then brought in the Court of a Munsif the suit out of which this appeal has arisen. The Munsif dismissed it on a ground which I am unable to understand. His decision was confirmed by the Additional Subordinate Judge of Bareilly who appears to have been of opinion that whether the land was originally let for pasturage or not it is now, and was, at the date of the institution of this suit, being cultivated by the respondent, and

is therefore a holding within the meaning of the Tenancy Act from which the respondent must be ejected, if at all, by suit in the Revenue Court. It might perhaps be sufficient to say that, as it was on the respondent's own plea that the Commissioner held that the suit could not be maintained in the Revenue Court, the respondent cannot say that the suit is not maintainable in the civil Court. But apart from that I am of opinion that this appeal should be allowed.

In this plaint the appellant stated that the land was originally let for pasturage, that the respondent did not attempt to plough it up till after the settlement of issues in the previous case, when the appellant pleaded that a right of occupancy could not be acquired in pasture land and that in that suit the respondent himself admitted that he had ploughed up the land after the issues had been settled. The respondent in his written statement did not even evasively deny the appellant's allegations. All that he said was that the land was under cultivation. Under these circumstances the allegations of the appellant must be taken to have been admitted: see O. 8, R. 5:

The respondent does not dispute the correctness of my decision in *Mohib Ali v. Surat Singh* (1), that a suit for the ejectment of a tenant from pasture land is cognizable by a civil Court. That decision is in accordance with several decisions of the Board of Revenue of which it is sufficient to mention that of *Chowdhury Mahomed Mahmud Khan v. Ganga Ram* (2). In the last resort, the respondent contends that as the land has been under cultivation for some years it must be taken that the appellant has consented thereto, and the land has now become a holding within the meaning of the Act, whether it was so or not before. It is sufficient to say that the appellant has for some years been trying to eject the respondent from the land, and even if it could be shown that he had accepted rent from the respondent since the land was brought under cultivation, I should hold that the appellant was still entitled to contend that it is not a holding within the meaning of the Act.

(1) [1912] 15 I. C. 743.

(2) Selected Decisions No. 6 of 1910.

For the above reasons I allow this appeal, set aside the decrees of the Courts below and decree the appellant's claim with costs in all three Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 464

RICHARDS, C. J.

Miharban Singh—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 635 of 1915, Decided on 6th September 1915, from order of Dist. Magistrate, Etah.

(a) Criminal P. C (5 of 1898), S. 110—Zamindar not to be bound over merely for not opposing dacoits—Respectable witnesses not to be disbelieved on ground of influence of accused zamindar.

A zamindar of a village cannot be bound over under 110, Criminal P. C. merely because he did not actively oppose a gang of dacoits.

Where a zamindar, who is also a money-lender is prosecuted under S. 110 and in defence he produces a number of respectable witnesses besides his castemen and tenants, it is not proper for the Magistrate to disbelieve all the witnesses so produced merely on the ground that the accused could by the influence of his position in life produce any number of them.

[P 464 C 2]

(b) Criminal P. C (5 of 1898), S. 110—No appeal lies to High Court—High Court can see if the lower Court has dealt fairly.

A High Court is not a Court of appeal in cases under S. 110 and the responsibility of administering that section does not rest with it. It is nevertheless a section which Magistrates ought to administer with the most scrupulous care, both as the Court of first instance and the appellate Court. A High Court ought not to take upon itself to weigh the evidence given on behalf of one side or the other. It ought only to see whether the Court below has approached the consideration of the appeal in a fair way having regard to the interest not only of the prosecution but also of the accused. [P 465 C 1]

W. Wallach—for Applicant.

R. Malcomson—for the Crown.

Judgment.—This is an application in revision against an order of the District Magistrate of Etah, dismissing an appeal of Miharban Singh against an order of a Magistrate of the first Class, directing him to give security to be of good behaviour under S. 110, Criminal P. C. Applicant is a zamindar and money-lender. It appears that a band of very desperate dacoits had, as their rendezvous, a place on the banks of the Kali Nadi on the boundaries of Etah and Mainpuri. The gist of the evidence of the police and unofficial witnesses against the applicant was that he harboured this band of dacoits. It would rather

seem as if it was intended at one time actually to charge the applicant as being a member of the gang; presumably because the necessary evidence was not forthcoming no substantive proceedings were taken against him. S. 110, Criminal P. C., defines the class of persons against whom an order for security may be made:

(a) A man who is by habit a robber, house-breaker, or thief, or (b) is by habit a receiver of stolen property knowing the same to have been stolen, or (c) habitually protects or harbours thieves, or aids in the concealment or disposal of stolen property, or (d) habitually commits mischief, extortion or cheating or counterfeiting coin, currency notes or stamps, or attempts so to do, or (e) habitually commits or attempts to commit, or abets the commission of offences involving a breach of the peace, or (f) is so desperate or dangerous as to render his being at large without security hazardous to the community.

There is not a particle of evidence that the applicant comes under any part of this section except a portion of (a), namely, that he habitually protects or harbours thieves. There is not even any allegation that he was in the habit of concealing or disposing of stolen property. The evidence, such as it is, is confined to his alleged association with a particular gang which had made, as I said before, its rendezvous in the neighbourhood of his village. It must be borne in mind that neither the applicant nor any of his villagers could be bound over under this section merely because they did not actively oppose the dacoits. It would be very well if zamindars and others recognised their duty and had the courage to give assistance to the police when gangs of dacoits settled in their neighbourhood, but their omission to do so does not render them liable under S. 110. There is no evidence that the applicant was in the "habit" of harbouring or protecting thieves. There is a good deal of evidence from which, if un rebutted, it might well be inferred that he assisted the gang in question. The prosecution examined a number of witnesses who said that the accused harboured these particular dacoits. One witness said that he had seen them at the house of the applicant, and one witness said that he had fed them. One of

the prosecution witnesses, namely, Thaman Singh, while deposing against the accused, said that he had heard that he was a man of good character. No witness was produced on behalf of the prosecution from the accused's own village. The accused produced 46 witnesses, most of them from his own village including the headman and patwari and the headman of a neighbouring village.

This Court is not a Court of appeal in cases under S. 110 and the responsibility of administering that section does not rest with the High Court. It is nevertheless a section which Magistrates ought to administer with the most scrupulous care, both the Court of first instance and the appellate Court. Magistrates ought always to bear in mind that the indirect results of binding a man over under S. 110 may be very terrible and that there is always the possibility of the section being abused. In the present appeal I do not think that I ought to take upon myself to weigh the evidence given on behalf of one side or the other. I ought only to see whether the Court below has approached the consideration of the appeal in a fair way having regard to the interest not only of the prosecution, but also of the applicant. The learned District Magistrate has discarded the evidence of all the witnesses produced by the accused who were his tenants or his fellow-castemen. It may perhaps be urged that when the question at issue is the good or bad character of an individual, the evidence of his fellow castemen ought not to be discarded solely on the ground that the witnesses are his fellow-castemen. The learned District Magistrate proceeds:

"There still remains a large number of others against whom no allegation can be made. The easy course in such cases is simply to say that there is no reason to distrust them and that they must therefore be believed. I do not however think it is right to do so. The evidence for the prosecution has raised a very strong prima facie case against the appellant and he has to rebut it. As the Deputy Magistrate observes:

"It is never a matter of difficulty for a man who has the influence of a gang of dacoits at his back, and is at the same time a zamindar and money-lender, to produce as much evidence as he wants and the production of 46 witnesses by the appellant does not therefore mean that he is of good character. The forces of evil are by no means to be ignored. If they were, we should not be troubled with an outbreak of crime like dacoity." Appellant has, I think, made full use of his influence to bring up evi-

dence, and has had the help of his position and also no doubt of the aforementioned Misri Lal whose election to the post of lambardar he was instrumental in securing. This influence has probably prevented the production of purely local evidence, the absence of which is one of the points made by the appellant."

It seems to me that this was not a fair way of dealing with the evidence of witnesses whom no reason could be given for disbelieving. The only reason suggested by the learned District Magistrate is that the applicant had a gang of dacoits at his back. It seems to me that this means that he disbelieved the evidence adduced by the accused because he was guilty. In other words he convicted the man first. The learned Magistrate said that the accused had to rebut "the strong prima facie case made against him." How could he rebut the case otherwise than by producing a large number of witnesses against whom no allegation could be made. The learned District Magistrate has, in my opinion, given no legitimate reason for disbelieving the evidence of a large number of persons who deposed to the good character of the applicant, persons residing in his own village and in the immediate neighbourhood. I cannot help feeling that, where a person is of a notoriously bad character, he will as a general rule find difficulty in producing respectable honest persons to dispose to his good character. It may possibly be that the applicant in the present case and all his fellow-villagers are little better than the gang of dacoits who made the neighbourhood their meeting place, but this was not the case made either by the police or by any of the witnesses for the prosecution and it is not the reason which the learned District Magistrate gives for disbelieving a large number of witnesses produced by the applicant and who were not shown to be in any way under his influence either as tenants or even as fellow-castemen. In my opinion the learned District Magistrate did not approach the consideration of the appeal from a proper point of view, and on this account I think the order ought to be set aside. I accordingly allow the application, set aside the order of both the Courts below and direct the bail bond to be cancelled.

V.B./R.K.

App'ation allowed.

A. I. R. 1915 Allahabad 466

RICHARDS, C. J. AND BANERJI, J.

Badri Prasad—Plaintiff—Appellant.

v.

Thakurain Gambhir Kunwar and another—Defendants—Respondents.

First Appeal No. 64 of 1913, Decided on 13th November 1914, from decision Sub-Judge, Mainpuri, D/- 7th October 1912.

(a) Evidence Act (1 of 1872), Ss. 68 and 71—Proof of document—Only living attesting witness denying execution—Other evidence is admissible.

Where the only living attesting witness of a document was illiterate and on being examined denied its execution :

Held : that the document could be proved by other evidence. [P 467 C 2]

(b) *Pardanashin Lady*—Dealings must be understood by them—Consideration must be proved.

In case of dealings with *pardanashin ladies* it is very important to see that such ladies understand what they are doing. It is also most important to see whether there was real consideration. It is necessary that a lady should have actually signed a bond with her own hand. If she was illiterate she could not sign it. It is sufficient to find that the bond was executed in her name by some one whom she permitted to do so. [P 467 C 1]

Sunder Lal and *S. N. Sen*—for Appellant.

Sahwney—for Respondents.

Judgment.—This appeal arises out of a suit brought for foreclosure of a mortgage by way of conditional sale. The sum alleged to be due on foot of the mortgage is Rs. 12,557 and the mortgage is dated 7th January 1896. The principal defendant was one Thakurain Gambhir Kunwar, the alleged mortgagor. The other defendants were the representatives of a person who was alleged to be a prior mortgagee of the said property. The principal defendant pleaded that she did not execute the document sued on, that she received no consideration, that she was a *pardansashin lady* and that if any document had been executed on her behalf, she was not bound by it. The other defendants did not appear. The Court below has dismissed the plaintiff's suit. Hence the present appeal.

The alleged mortgage will be found printed at p. 20 of the appellant's book. It commences by a recital of the ownership of Mt. Gambhir Kunwar, and states that the property was already mortgaged to one Ganpat Gopal to secure a sum of Rs. 1,500 with interest at 11 annas

per cent per mensem and that it would be desirable to pay off that debt as the rate of interest was high. It further recites that Government revenue and irrigation charges were due. The property then purports to have been hypothecated to secure Rs. 3,625. Rs. 3,000 were left in the hands of the mortgagee for payment of the debt due to Ganpat Gopal, Rupees 580 were left to pay the revenue and irrigation charges, Rs. 45 was taken in cash to pay the expenses of the mortgage and the stamp paper, fee, etc. Six names appear as marginal witnesses. There is an endorsement on the document which shows that it was presented for registration on 8th January 1896 but stating that the document had not been signed by the Musammat. The Sub-Registrar himself evidently went to the house of the mortgagor, for there is a further endorsement dated 8th January 1896, from which it appears that he had gone to the house but there being no identifying witnesses, he could not register the document and returned it to the plaintiff. A third endorsement shows that on 16th January 1896 the Musammat came to the tahsil (which was the registration office) in a dooli, that she was there identified by her own brother, one Thakur Prasad, and by another person of the name of Khaman Singh who was her *karinda* both of whom were known to Kampta Prasad, a petition-writer and to Shib Dayal, the *patwari*, who were known to the Sub-Registrar.

According to the endorsement the Musammat admitted the execution and completion of the document and acknowledged that she had received the amount. The sum of Rs. 579-7-3 in cash was received by her in the presence of the Sub-Registrar. It further appears from the endorsement (which is by no means unusual) that the money was thereupon deposited for the purpose of paying the Government charges. The latter document which is recited in the mortgage, is dated 21st May 1889. This document has been abundantly proved by a number of witnesses including a witness who was very hostile to plaintiff namely, Chaudhri Raghbir Singh, a marginal witness. It is produced by the plaintiff with an endorsement upon it, dated 21st January 1896, showing that the full amount due upon it had been

paid by the plaintiff to one Ram Kishore whose son-in-law the nominal mortgagee was. Evidently it was because it was not the nominal mortgagee who had given the endorsement that the defendants of the second party were added as parties. The learned Subordinate Judge in his judgment says :

" It is clear from the evidence on the record that Thakurain Gambhir Kunwar is a pardanashin lady and at the time of the execution of the bond in suit she was only 26 or 27 years of age and her brother Thakur Prasad is three or four year younger to her. Under these circumstances it is for the plaintiff to prove by satisfactory evidence that the lady had independent advice that she fully understood the bond and was perfectly aware of what she was undertaking and that she actually executed the bond and got the consideration."

No doubt in the case of dealing with padanashin ladies, it is very important to see that such ladies understand what they are doing. It is also most important to see whether there was real consideration. It was not necessary, in our opinion, that the lady should actually sign the bond with her own hand. If she was illiterate she could not sign it. It is sufficient for the Court to find that the bond was executed in her name by some one whom she permitted to do so. In the present case her name is affixed to the bond in the handwriting of her brother Thakur Prasad. With regard to "independent advice" and to the lady understanding the bond, if we were to come to the conclusion that there was an outstanding debt due on the earlier bond, and that that debt was discharged and that the revenue and irrigation charges were due and paid, we think that the transaction was of a very simple nature which could be easily understood by the lady.

A consideration of the evidence leaves in our mind no doubt whatever that the earlier bond of 21st May 1889 was outstanding, that it was a genuine bond and that it was duly discharged by the plaintiff. We have no doubt further that the revenue and irrigation charges were due and discharged. The learned Subordinate Judge has come to no conclusion inconsistent with this view.

The endorsement in the bond clearly shows that on 16th January 1896, some woman, who was identified to the Sub-Registrar in a satisfactory way as the defendant, admitted the execution of the bond and the receipt of considera-

tion. Thakur Prasad, the brother of the lady, was called as a witness by the plaintiff. It was impossible to avoid this. It is clear that he was a hostile witness, but he had to admit that he signed the bond in no less than four places. He gives a lame excuse that he did not understand what he was doing and the learned Subordinate Judge says: "I do not think this version of his is true. There must have been something else." If we are right in the conclusion that the prior mortgage was outstanding and was discharged by the plaintiff, the probability of the Musammat having executed the bond in suit is great. Five out of the six marginal witnesses are dead and the plaintiff was obliged to call the only surviving witness, namely Subol Singh. He said that he was illiterate, that he did not know Mt. Gambhir Kunwar, that he did not attest any document executed by her. It is true that his name in the document is not in his handwriting; it could not be so, because he is illiterate. His statement that he did not know the Musammat is clearly false, because he himself later on admits that she was his paternal aunt. It of course, lay on the plaintiff to prove the execution of the document. It must be borne in mind however that no defence was specially pleaded that the document was not attested in accordance with the provisions of the Transfer of Property Act. S. 68, Evidence Act provides:

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. If there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence."

Section 71 further provides that "if the attesting witness denies . . . the execution of the document, its execution may be proved by other evidence." Badri Prasad complied with the law in this respect. He called the only surviving witness, who denied that he had been a witness to the document. He proved himself that the Musammat executed the document in his presence and in the presence of the marginal witnesses whose names appear in it. There is no doubt some little confusion as to the place where the document was signed on behalf of the lady. This is not altogether surprising after the lapse of time. It must also be borne in mind that the

lady herself has never thought fit to go into the witness box or give evidence on commission and deny the execution of the document nor has any other evidence been given to show that there was any legal defect in the execution of the document. We have not the smallest doubt on the evidence that the Musamat knew all about the bond, that the bond was intended to wipe out the debt on the prior bond and to pay the Government charges that were due. We have not the least doubt that her brother signed the document on her behalf (she being illiterate) with her consent and approval. We have not the least doubt that the transaction was a bona fide transaction. The only matter about which we have any hesitation is the question whether or not the provisions of S. 59, T. P. Act, were complied with. On this question we again point out that there was no special defence of this nature set up in the Court below and that, while the evidence of the plaintiff may not be absolutely satisfactory, no rebutting evidence was given on behalf of the defendant. We think that it would not be just that we should decide against the plaintiff on this technical ground which was not pleaded nor proved and was not a ground upon which the learned Subordinate Judge decided against the plaintiff. As we have said before, Badri Prasad proved prima facie the due execution and attestation of the bond in suit. He also produced two witnesses who proved the execution of the document by the lady at the registration office. As we have said above, a woman appeared before the Sub-Registrar who was identified by Thakur Prasad, the brother of Gambhir Kunwar, Thakur Prasad admitted his signature below the endorsement as to identification. It is most unlikely that he would have identified the woman unless she was in fact his sister, Gambhir Kunwar.

We allow the appeal, set aside the decree of the Court below and decree the plaintiff's claim with costs and direct that unless the amount claimed is paid with costs in this Court and in the Court below and interest at the stipulated rate within six months from this date, the right of redemption of the defendant will be foreclosed and the plaintiff will be entitled to possession. The costs of this Court will include fees on the higher

scale. The decree will be drawn up in the usual form.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 468

CHAMIER AND PIGGOTT, JJ.

Mt. Kulsumunnissa Bibi—Defendant
—Appellant.

v.

Dauru Nath and others — Plaintiffs—Respondents.

First Appeal No. 47 of 1915, Decided on 23rd June 1915, from order of Addl. Judge, Aligarh.

Agra Tenancy Act (2 of 1901), S. 79 — Muafidars after 1838 recorded as tenants on privileged rents and rights of transfer—Suit by them against landlord for possession is not tenable in civil Court.

Certain persons were recorded as muafidars in respect of certain plots of land prior to 1838. In 1838 the land was settled with the zamindar and the ex-muafidars were entered as tenants on payment of a privileged rate of rent with a right of transfer in the holding. In the settlements of 1861 and 1868, they were again recorded as tenants with a right of transfer in the holding. The tenants were dispossessed by the landlord from a portion of the land. They sued the landlord to recover possession in the civil Court:

Held: that the ex-muafidars were tenants within the meaning of S. 79, Agra Tenancy Act, and a suit to recover possession was not maintainable in the civil Court. [P-474 C 1]

Motilal Nehru—for Appellants.

Peary Lal Banerji — for Respondents.

Piggott, J.—In this case the defendant-appellant is the sole proprietor of Mauza Danpur in the Bulandshahr District. The plaintiffs-respondents are residents of that village. Their suit was for recovery of possession in respect of a particular plot of land, 1 bigha 15 biswas in area, situated in this village, from which they alleged themselves to have been wrongfully ejected by the defendant. The precise date of the alleged dispossession is not given in the plaint, but the plaintiffs dated their cause of action from an adverse decision of the Revenue Court on the question of mutation. The dispossession clearly took place somewhere towards the close of the year 1909. The case as stated in the plaint may be summarized thus: The plot of land in question was originally owned by one Param Sukh, from whom it descended to his grandsons, Baldeo Das and Tula Ram. Tula Ram pre-deceased Baldeo Das and the latter died somewhere about the year 1885. The plaintiffs are distant cousins of Baldeo

Das and Tula Ram, claiming descent from Durga Das, own brother of the father of the said Baldeo Das and Tula Ram. The plaintiffs nevertheless asserted that they were members of a joint undivided Hindu family with Baldeo Das and Tula Ram, so that the plot of land in question passed to them by survivorship on the death of Baldeo Das. They admitted however that in the village records, whatever rights had belonged to Baldeo Das were entered after his death as belonging to Mt. Sundar, the widow of his predeceased brother, Tula Ram. They said that this was done with their consent "for the consolation" of this lady.

In the plaint as drafted they clearly intended to claim that Mt. Sundar was not really in possession, except in so far as she enjoyed a Hindu widow's right of maintenance out of the joint family property. Mt. Sundar died in the year 1909 and the defendant, as proprietor of the mahal, took possession of the land in suit. The defendant's claim was that the land in Mt. Sundar's possession, at any rate, was a mere occupancy holding and that it escheated to the proprietor of the mahal because Mt. Sundar left behind her no heir entitled to succeed under S. 22, Tenancy Act (Local Act 2 1901). The plaintiffs said that they fought the matter in mutation before the revenue Courts, but the decision there was against them. It is fair to note however that in the plaint itself the claim was put in an alternative form. In para. 5 of the plaint it is distinctly stated that Mt. Sundar had no right in the property in dispute. There is however an alternative plea, that if the lady was in fact in possession in her own right then her rights were those of a Hindu widow and the property came to the plaintiffs on her death as the nearest surviving reversioners of her husband. The nature of the defence set up has already been sufficiently indicated. Before issues were fixed in the Court of first instance, the learned Munsif found it advisable to examine the plaintiff, Chaube Dauru Nath, who made a statement on 10th February 1913 on behalf of himself and of the other plaintiffs. This statement was obviously interpreted by the learned Munsif as considerably modifying the pleas taken in the plaint. It has been read to us in detail, and I think the learned Munsif was substantially right in so regarding it. Undoubtedly

the plaintiff Dauru Nath was anxious to hedge as far as possible and to evade the attempts made by the Court, while he was under examination, to tie him down to definite pleadings of fact on certain points. In substance however he did admit that Mt. Sundar obtained actual possession in 1885, on the death of Baldeo Das, and that she was in possession for 24 years until her death. He went on to explain that he himself and the other plaintiffs really managed Mt. Sundar's affairs for her and claimed to have been in joint cultivation with her of the land in suit. He said that the Court might regard his position with respect to this cultivation as that of a servant or as that of a partner; but I have no doubt he did intend to plead that he was sharing in the cultivation of the holding at the time of Mt. Sundar's death, within the meaning of S. 22, Agra Tenancy Act. The learned Munsif proceeded to fix a number of issues, of which he decided only two. The first of these was:

"Whether Mt. Sundar held the disputed plot in village Daupur as an occupancy tenant or as an absolute owner?"

The frame of the issue is, I think, justified by the fact that the plaintiff Dauru Nath, in his statement before the Court, had admitted Mt. Sundar's possession and had practically abandoned the plea put forward in the plaint that Mt. Sundar had never been in possession at all. On the issue thus framed the learned Munsif, after an elaborate discussion of the evidence and of the law, which he considered applicable to the facts of the case, recorded a finding that the land held by Mt. Sundar was her occupancy holding and succession to the same was governed by the provisions of the Tenancy Act. This finding in itself was not conclusive against the plaintiffs, unless and until the Court had gone on to determine the question of their alleged sharing in the cultivation of the holding at the time of Mt. Sundar's death. This the learned Munsif did not do, but he proceeded to take up another issue stated by him in the following terms:

"Whether the suit is cognizable in the civil Court"

The issue is not very happily framed. The suit as brought was based upon a claim of proprietary right, and was undoubtedly cognizable in the civil Court. Nevertheless it is sufficiently

clear what the learned Munsif meant by this issue and what he has actually found in respect of it. If Mt. Sundar was an occupancy tenant of the land in suit the plaintiffs, supposing that they proved their case so as to give them a right to succession under S. 22, Tenancy Act, would have to prove that they were joint in cultivation with this lady at the time of her death. They were subsequently ejected by the defendant zamindar. They were therefore in the position of tenants ejected by the landholder otherwise than in accordance with the provisions of the Tenancy Act. That ejection would give them a right of suit for recovery of possession and for compensation under S. 79 of the same Act, and inasmuch as they possessed that right of suit, the provisions of S. 167, Tenancy Act (read with reference to S. 79 aforesaid and Serial No. 30 in group (c) of the suits specified in Sch. 4 of the same Act) would debar the plaintiffs from bringing a suit for recovery of possession in the civil Court. This is what the learned Munsif obviously intended to find and has in substance found; and he dismissed the plaintiffs' suit accordingly. The latter appealed, and I shall have a few remarks to make presently regarding the position taken up by them in the memorandum of appeal. At present what I wish to notice is that, in the interval between the filing of the appeal and its determination, there had been a decision by this Court in Second Appeal No. 1456 of 1913, decided on 17th July 1914. This decision was laid before the lower appellate Court and obviously determined the result of the appeal in that Court. It was another suit from the same village and the present defendant-appellant, as proprietor of the village, was a party to it. The other parties were different, and it has never been suggested that the decision had in any way the effect of *res judicata* upon the present litigation.

It was however a decision respecting a plot of land held on substantially the same tenure as the land in dispute in the present case. The point for determination however was not quite the same in the suit which resulted in Second Appeal No. 1456 of 1913. The holder of the land had mortgaged it. The mortgagee brought a suit upon his mortgage, obtained a decree, brought the

mortgagor's rights to sale and purchased them himself. While these proceedings were going on the mortgagor relinquished his rights, whatever they might be in favour of the proprietor of the village. On the strength of this relinquishment the proprietor succeeded in obtaining possession. The suit was by the mortgagee auction purchaser for recovery of possession. The point which the Court had to determine was whether the rights of the mortgagor in the property in suit, whatever those rights might be, were or were not transferable. In that case the finding of the lower appellate Court had been that the mortgagor's rights were those of an occupancy tenant and were not transferable. In appeal, this finding was treated by this Court as a mixed question of law and of fact. The learned Judges who disposed of the appeal set forth in their judgment a statement of what were represented to them as being admitted facts with regard to the previous history of the land in suit. From those facts they drew an inference as a point of law, that the rights of the mortgagor in the land then in question were proprietary rights, that the payments which the mortgagor had admittedly been making to the proprietor of the village could not properly be described as "rent" within the meaning of the definition in S. 4, Cl. (3), Tenancy Act, and that consequently there was no question of the existence of tenancy, but the rights of the mortgagor being proprietary rights were transferable. On these findings the plaintiff's suit was decreed. In the present case the learned Subordinate Judge has accepted this decision as a ruling laying down principles on which he was bound to act. He does not seem to have considered whether the recital of admitted facts in the decision of this Court, to which he was referred as a ruling, did or did not agree with the facts alleged by the parties and proved by the evidence in the present case. He did however give a brief recital of certain facts regarding the previous history of the land in suit, which is correct enough as far as it goes. On these facts he recorded a finding in the following terms:

"That Param Sukh and Baldeo, & Co., were not occupancy or non-occupancy tenants of the disputed plot but that they were owners thereof. The so-called rent which they have been paying

is in revlity the Government revenue and cesses."

He went on to say that "even if those persons be supposed not owners of this land, they could not be said to belong to any of the classes of tenants specified in S. 6, Tenancy Act."

He found that they were "something more than tenants," and that their rights were transferable as well as heritable. On these findings he held that the suit was not barred by S. 167, Tenancy Act, but was maintainable in the civil Court as brought. He was of opinion however that there remained other issues which ought to be tried out before the suit could either be decreed or dismissed. He accordingly treated it as having been dismissed by the Court of first instance upon a preliminary point and remanded it to that Court under O. 41, R. 23, Civil P. C., for decision on the merits. The defendant comes to this Court in appeal against this order of remand.

Two comments may be made at once on the finding of the learned Subordinate Judge. The first is that a finding to the effect that the rights of Param Sukh and Baldeo in the land in suit were proprietary rights was scarcely open to the learned Subordinate Judge in appeal. I have carefully considered the memorandum of appeal presented to that Court by the plaintiffs and it seems clear to me that the claim of proprietary rights was abandoned and was not intended to be pressed in the Court of first appeal. In para. 1 the plaintiffs stated their case to be that Baldeo Das had held "transferable rights of occupancy" in the land in dispute. In para. 2 it is pleaded that Mt. Sundar was not a mere tenant under Act 2 of 1901; "the aforesaid land has nothing to do with Act 2 of 1901." There is nothing else in the memorandum of appeal to modify the position here taken up. The finding therefore which was really open to the lower appellate Court was the alternative finding that the plaintiffs are something more than tenants, and this finding is based upon a certain finding of fact and an inference drawn therefrom. The finding of fact is that the rights possessed by Param Sukh and Baldeo were transferable as well as heritable. The inference drawn therefrom is that persons possessing such rights cannot be tenants within the meaning of

that word as used in what for the purposes of this case is the critical section, namely, S. 79, Agra Tenancy Act. It is clearly open to us therefore to reconsider this question of the existence or otherwise of a tenancy as a mixed question of law and of fact in the present appeal.

The other comment which may be made at once on the finding of the lower appellate Court is that it does not warrant the further decision of the learned Subordinate Judge to the effect that the suit is not barred by S. 167, Tenancy Act. The finding is limited to "Param Sukh and Baldeo, &c." I do not quite understand what the learned Subordinate Judge meant by "etc.", but it is clear that he did not consider the question of the rights of Mt. Sundar. The defendant no doubt contended that Param Sukh and Baldeo and all other holders of similar tenures in this village were nothing more than occupancy tenants, but for the purposes of this suit she raised most distinctly a further plea as to the position of Mt. Sundar. She pointed out that under no apparent principle of law could Mt. Sundar have succeeded by inheritance to the rights of Baldeo Das, the brother of her deceased husband. From this the defendant desired to contend that the possession of Mt. Sundar at any rate was merely permissive on the part of the zamindar and that, although she was an occupancy tenant of this land at the time of her death, she had only become so under the ordinary law in virtue of her long possession. This point was not determined by the lower appellate Court although it required to be determined before there could be a definite finding on the question whether the suit was or was not barred by S. 167, Tenancy Act.

The question, therefore, to my mind is whether we ought to set aside the order of remand as passed and substitute for that order an order fixing necessary issues for preliminary determination under the provisions of O. 41, R. 25, Civil P. C., or whether, while setting aside the order of the lower appellate Court, we are in a position to affirm, on the record as it stands, the decision of the first Court dismissing the suit. On the whole I incline to the latter alternative, and I do so because on the facts established by the evidence it seems to me to follow as an inference of law that the right

not only of Mt Sundar, but of Baldeo Das before her, in the land in suit were at any rate no higher than the rights of "tenants" within the meaning of that word as used in S. 79, Agra Tenancy Act. The land in suit formed part of some 300 bighas of land in this village the previous history of which has been laid before us at considerable length. In dealing with this history we have to remember that the revenue records of the Bulandshahr District perished during the Mutiny, and that the information available as to events prior to 1857 is scanty.

It appears however that in the year 1838 these 300 bighas were in the possession, as separate plots of land, of a number of persons who claimed to hold the same as muafidars under a grant anterior to the establishment of British rule in the district in question. There was an inquiry of some sort and a decision, was come to adverse to the claims of these muafidars. The muafi was resumed and the land was ordered to be assessed to revenue. So much of it as was not covered by groves was to be assessed at once and the groves were liable to assessment by degrees as they lost their character as such. In the judgment of this Court in the connected suit, to which reference has already been made, it is stated as one of the admitted facts that, when the muafi was thus resumed, it was settled with the muafidars. This is certainly not an admitted fact in the present case: so far from its being an admitted fact the evidence to the contrary seems to me perfectly clear. The plaintiffs-respondents rely upon an expression used in a petition presented to the settlement officer in 1861 which speaks of the muafi land as having been included in the khalsa and settled with the owner of the village "in the course of the settlement now current."

The inference sought to be drawn from this is that the land was so included and so settled for the first time in 1861. I am satisfied that the words will not bear that interpretation. They mean that the land had been so included and so settled during the currency of the settlement which was being revised in the year 1861, and that the land was included in the khalsa and settled with the proprietor of the village in consequence of the order of resumption passed

in the year 1838. At two subsequent settlements the question of the rights of these ex-muafidars came up for determination. In 1861, and again in 1888, the ex-muafidars claimed to be proprietors and to be settled with as such. In both years the decision was against them. They were excluded from the khewat of the village and ordered to be recorded as maurusi tenants in 1861, and as kashtkaran dakhilkar in 1888. Another fact stated as one of the admitted facts of the case in the judgment of this Court in Second Appeal No. 1456 of 1913 is that, in the settlement of 1861, the transferable rights possessed by these ex-muafidars were expressly recognized by the settlement officer. This is not an admitted fact in the present case, and there is no evidence on this record to prove it.

The proceedings of the year 1861 need to be carefully considered. There was first of all a proceeding with regard to the drawing up of the khewat, which resulted in a decision that the ex-muafidars were not entitled to be recorded in the khewat. After this decision had been arrived at, there was a question as to the preparation of the jamabandi. This involved a variety of questions, such as the nature of the tenancy to be recorded in respect of these former muafi lands and the rent to be assessed thereon. These questions were settled by agreement between the parties, and largely on the strength of a petition presented by the authorized agent of the proprietor of the village. Great stress was laid on the wording of that petition by the learned Judges who decided the connected case.

It does not seem to me in any way inconsistent with the rest of the evidence in the case, or with the fact that the ex-muafidars were recorded as occupancy tenants of these lands at the settlement of 1861. The petition of the proprietor of the mahal, after reciting the facts regarding the resumption of the muafi grants and the settlement of these lands with the said proprietor, goes on to say that, out of consideration for the long possession of these former muafidars, he has come to an agreement with them that they shall only be required to pay him the land revenue assessed on these lands together with a percentage which he speaks of as "a haq malikana." If

stress is to be laid on these words on behalf of the respondents, it is only fair to the other side to notice that the petition of the landholder's agent expressly is that the money thus payable be recorded in the rent roll, that is to say in the jamabandi. This is in fact what was done at that settlement. The ex-muafidars were recorded as occupancy tenants holding at a rent representing the land revenue payable on these plots plus 10 per cent. The question was raised again at the settlement of 1888, and it is to be noted that Mt. Sundar herself appears as one of the persons who raised this question. In the settlement of that year again the petition of the ex-muafidars claiming proprietary rights and asking for a settlement direct with them was disallowed.

The settlement officer however seems to have felt some difficulty about these ex-muafidars and to have regarded them as occupying a status of a somewhat peculiar kind. He directed that they should be recorded as occupancy tenants; but he appended to that order a direction which was in fact carried out to the effect that in the village Record-of-Rights there should be a note made to the effect that these ex-muafidars, of whom a detailed list was given, were occupancy tenants holding at privileged rates and that they had transferable rights in their holdings. It seems to me that this is practically all the evidence in the case with which we have to deal, and the real question to my mind is simply whether the payments which these ex-muafidars have during all these years been making to the proprietor of the mahal do or do not amount to rent within the meaning of the definition in S. 4, Cl. (3), Tenancy Act. The money thus payable has been directed to be recorded as rent at two consecutive settlements. In face of the refusal of the proper authorities at both those settlements, to recognize any sort of proprietary rights in these ex-muafidars, it seems to me impossible to hold that the payments which they were to make to the proprietor of the mahal represented anything more than what the settlement officer in 1888 had held it to be, namely, a special or privileged rate of rent. The contention before us on behalf of the respondents was that the proceedings in 1861 and in 1888 should be

treated as having been a sort of sub-settlement with the ex-muafidars, under the provisions of Ss. 53, 54, 55 and 56 Land Revenue Act, then in force, Act 19 of 1873. Special reliance is placed upon the provisions of S. 56. If I thought it could reasonably be contended that the settlement officer in 1888 had recognized that these ex-muafidars possessed proprietary rights of some kind in the lands in their possession, I should have been prepared to hold that, as a matter of law, it is not impossible under these provisions of the Land Revenue Act for a settlement officer to recognize certain persons as holding a status substantially analogous to that of sub-proprietors in Oudh. It seems to me however that the settlement officer in 1888 followed, even though it may have been with reluctance the precedent set by his predecessor in 1861 in refusing to recognize the existence of any kind of proprietary rights in these ex muafidars.

The other principal point urged upon us on behalf of the respondents is that we ought not to have regard exclusively to the definitions of "rent," "land holder" and "tenant" in S. 4, Tenancy Act, but we ought to consider further the classification of tenants given in S. 6 of the same Act. As I understand the position the respondents wish us to record definitely one way or the other a finding whether the rights possessed by these ex-muafidars were or were not transferable, and if we find that the rights were transferable; then to hold that this fact alone makes it impossible for them to be tenants within the meaning of the Tenancy Act. When the settlement officer in the year 1888 was considering substantially this very question it was urged upon him that he ought not to make any entry of a custom under which the exmuafidars had transferable rights in their holdings because such a custom would be in contravention of statute law. On this he remarked that it might be for the Courts hereafter to determine whether the statute law, beginning with the Rent Act of 1873, had or had not taken away from these particular tenants the rights of transfer which they previously enjoyed, or whether it was not possible that, in spite of the statute law, there should be a body of occupancy tenants who, by reason of the manner in which their tenancy had come

into existence and had been recognized by the proprietor of the mahal, had succeeded in acquiring and retaining transferable rights in spite of the statutory prohibition. In any case the settlement officer said: 'I shall record the existence of custom if I find it fully established; and he proceeded to do so. In the view which I take of this case it is not necessary for us here to determine this question of the transferability of these holdings. It is possible that they are not transferable, but to my mind it is conceivable that they may be transferable and that their transferability may be established hereafter by other decisions besides the one of this Court in the connected suit to which I have already referred. I am of opinion however that even though it were proved that by reason of special local custom or of the previous history of these holdings and of the manner in which they came into existence, the tenants thereof have retained transferable rights they would nevertheless continue to be "tenants" within the meaning of that word as defined in S. 4. and as used in S. 79, Tenancy Act. For these reasons, in my opinion, the proper order for us to pass is one setting aside the order of remand passed by the lower appellate Court and restoring the order of the first Court dismissing the suit with costs.

Chamier, J. — I, too, am of opinion that this appeal should be allowed and the suit dismissed. I desire to add only a few words with regard to what took place in 1838 and the contention that the holding is transferable and therefore the person entitled to it are not tenants within the meaning of the Tenancy Act. The Gazetteer shows that the pargana in which the land now in question lies became part of British India in or about the year 1803. Between that year and 1838 there were several settlements in the district. Regulation after regulation had been passed for the purpose of ascertaining the nature and extent of muafi grants in the Province. Arrangements had been made to have all such grants entered in a register and every effort had been made to induce persons claiming to hold as muafidars to come forward with their claims. When the claim of the holders of the land now in question was put forward in 1838 it was summarily rejected, both because the claimants were

unable to produce any documentary evidence, and also because the alleged muafi grant had not been entered in the prescribed register. Most of the old records have disappeared but it is clear to me from the extracts from records of 1861 which have been put in evidence that the Court in 1838 not only decided that the claimants were not entitled to hold the land as muafidars but went on to settle the land with the zamindar of the village, and it appears that as long ago as 1842 or 1843 the holders of the land in question were recorded as tenants. It is important, I think, to remember that in 1838 a person holding under a muafi grant which the Government declined to recognise was presumed to be the proprietor of the land until some one else was able to establish title against him. It is also important to notice that Regn. 7 of 1822 contained provisions for the recognition and recording of persons found to be holding heritable and transferable proprietary rights in a mahal in subordination to the zamindar and those provisions were repeated and amplified in S. 53 to S. 56, Act 19 of 1873 and again in S. 75 and the following sections of the present Land Revenue Act.

Notwithstanding the presumption referred to above and the existence of these provisions from before 1838 up to the present time, no official has recorded the holders of these lands as being entitled to heritable and transferable proprietary rights in subordination to the zamindar of the village. The holders of these lands have all along been recorded as hereditary tenants holding on favourable terms. It seems to me that if we were to hold that they were proprietors of the land we should be setting aside all that has been done regarding these lands since 1838. In my opinion it is quite clear that the holders of these lands, whatever they may have been prior to 1838, have not since that date been proprietors thereof.

I now turn to the question of the transferability of the rights of tenants. Prior to the Rent Act of 1859 there was no legislative enactment recognizing or conferring a right of occupancy upon cultivators. But the elaborate inquiries which preceded the passing of that Act showed that there was a consensus of opinion that 12 years' occupancy conferred at least a *prima facie*

right of occupancy and a provision to that effect was inserted in the Act. But that Act left the question of the transferability of tenures unprovided for. There were numerous and conflicting decisions as to the transferability of the rights of occupancy tenants, and to judge from a very recent decision of a Full Bench of the Calcutta High Court in *Dayamoyi v. Ananda Mohan Roy Chowdhuri* (1), the conflict of opinion still continues in Bengal. The Full Bench concluded their judgment with the remark:

"We would only add that the uncertainty as to the transferability of holdings has been one of the most fruitful sources of litigation, and it is urgently necessary that it should be set at rest by the legislature."

Many years ago it was held by a Full Bench in Calcutta that an occupancy right was *prima facie* not transferable, but could be shown to be transferable by custom. That was understood to be the law in the North-Western Provinces also previous to the Rent Act, 1873. In a circular of the Board of Revenue of 1856, I find the following statement regarding the transfer of occupancy rights:

"It is to be understood that the Government is not opposed to the growth in the free course of private transactions of a transferable cultivating title, and no impediment should be thrown in the way of the admission by the zamindars of such title, or of its tacit creation, according to the wishes and interests of the parties concerned."

Between 1856 and 1873 it came to be recognized that the continual transfer of tenants' holdings was an unmixed evil, and in 1873 the legislature by S. 9, Rent Act, of that year, declared that no right of occupancy should be transferable by grant, will, or otherwise except in certain specified cases. This prohibition was repeated in S. 9, Rent Act, 1881, and is to be found in an amplified form in the present Tenancy Act. It seems to me quite clear that proof that the rights of the persons who held the lands now in question were transferable would by no means lead to the conclusion that they were other than tenants. It may be that it is not open to an occupancy tenant now to plead and prove that by custom his holding is transferable, but, even if he is entitled to do so, it is quite clear that proof that his holding is transferable will not convert him into a proprietor. I am satisfied that the holders of these lands have since 1838 been

nothing more than tenants and that what they have paid to the zamindar has been rent, although the amount of that rent has all along depended upon the amount of revenue assessed on the land. The learned vakil for the plaintiffs in the present case has relied strongly upon some proceedings of the Board of Revenue dated February and March 1892. Those proceedings were held upon an application for revision of an order passed by the Commissioner of Meerut on appeal against an order passed by the settlement officer. It appears that the settlement officer was asked to fix the rent payable in respect of these lands, and he did so. Mr. Kaye, Junior Member of the Board, gives a short sketch of the previous history of the case and says that the applicants were in 1864 found to be tenants with a right of occupancy liable to pay only a privileged rate of rent. He says as to the first contention advanced before them, namely, that the applicants were proprietors and not tenants:

"however curious and unusual the applicants' status may be, it is unquestionably a fact that they have been declared by judicial proceedings to be tenants and not proprietors, and that question cannot now be reopened."

He then goes on to consider the rate at which the jama assessable as rent should be fixed. In conclusion he says:

"I would set aside the Commissioner's order and fix rent at 42 per cent of the soil rents plus 10 per cent."

Mr. Reid, Senior Member, agreed with him, but in his opinion the holders of the land were liable to pay local rate also. Mr. Reid refers to the proceedings of the last settlement and says:

"From the proceedings of the last settlement it would appear that the lands were resumed *muafi* upon which the landlord of the mahal admitted that the *muafidars* had acquired a full proprietary title with rights of inheritance and transfer. There was consequently assessed upon them the Government revenue of the land together with a 10 per cent *malikant* allowance."

This is the passage upon which the learned vakil for the plaintiffs has relied. We have been unable to find in the proceedings of the settlement, to which Mr. Reid refers, any admission by the landlord of the mahal that the *muafidars* had acquired proprietary rights in the land. On the contrary it seems to us that the landlord has all along maintained that the holders were tenants. Even if the reference to the settlement proceedings

(1) [1915] 42 Cal. 172=27 I. C. 61.

by Mr. Reid is correct, and will bear the construction put upon it by the plaintiffs, his remark does not decide the question of title. He had no authority to decide that the holders of the land were proprietors, and it is quite certain that his colleague, Mr. Kaye, was satisfied that they were tenants. In my opinion there can be no doubt that the holders of these lands were tenants and paid rent as such. I therefore agree that the suit should have been dismissed.

By the Court. — The order of the Court is that this appeal is allowed, the order of the lower appellate Court is set aside and that of the Court of first instance is restored with costs.

V.B./R.K. *Appeal allowed.*

A. I. R. 1915 Allahabad 476

PIGGOTT, J.

Gauri Rai and others—Defendants—Appellants.

v.

Mt. Bhagginā—Plaintiff—Respondent.
Second Appeal No. 1539 of 1914, Decided on 5th November 1915, from decision of Dist. Judge, Ghazipur, D/- 30th June 1914.

Civil P. C. (5 of 1908), O. 41, R. 27—R. 27 must be strictly followed in admitting evidence in appeal.

In admitting evidence in appeal the Court should strictly follow the procedure laid down by O. 41, R. 27, Civil P. C., and specially by Cl. 2 of the rule. [P 477 C 1]

M. L. Agarwala—for Appellants.

Haribans Sahai—for Respondent.

Judgment.—This is an appeal by the defendants in a suit for arrears of rent. The only question is as to the rate of rent payable by the said defendants to the plaintiff-respondent. The first Court gave the plaintiff a decree based upon a rate of Rs. 4-9-6 per bigha per annum. On appeal by the plaintiff the District Judge found the rate of rent payable to be Rs. 8 per bigha per annum and amended the decree of the first Court accordingly. In second appeal it is contended that the decision of the District Judge was arrived at after an improper use of the powers of the Court under O. 41, R. 27, Civil P. C., that is to say, after improperly permitting the plaintiff to produce additional evidence. Secondly it is contended that the decision is liable to interference in second appeal because it was based on a misinterpretation of the documentary evidence before

the Court. These are the only pleas with which I am concerned. I may note that there was a good deal of evidence produced on the question of the rate of rent payable including entries in the patwari's papers and records of past litigation not between the same parties, which were alleged to be relevant to the issue before the Court for various reasons with which I am not concerned. Both parties however were agreed that there had been a previous litigation between the predecessors-in-title of the parties to the present suit in which this very point had been raised and decided. This was a litigation which terminated in a decree of this Court dated 5th January 1894. A copy of the judgment on which that decree was based was on the record. The important words in the judgment are the following :

"The decree of the revenue Court in favour of the plaintiff, who as assignee of one Manbahal, the lessee from the admitted landlord, is entitled to recover the rent found due to the landlord from the land admittedly held by the respondent, should be restored."

From the context it is clear that by the decree of the revenue Court was meant the decree of the Assistant Collector in that very case, which had been reversed by the District Judge in first appeal. I do not think it can be said that the lower appellate Court has misinterpreted these words. The learned District Judge remarks that the judgment of the High Court is silent about the rate of rent. On behalf of the defendants-appellants it is contended that the said judgment is not silent inasmuch as it lays down that the rent recoverable is that due to the landlord from the defendants. The suggestion I take it is that the District Judge should have gone on to ascertain from the materials on the record what was the rent due to the landlord, that is to say, to the superior proprietor of this land. I think however that the learned District Judge has correctly appreciated the situation. The judgment of the High Court did not merely lay down that the plaintiff was entitled to recover the rent due to the landlord; the expression used was "rent found due to the landlord." Read in connexion with the context, these words obviously mean the rent which the Assistant Collector found to be due; otherwise this Court in second appeal would not have restored the decree of the

Assistant Collector, but would have called for a finding as to the rate of rent due. Therefore the learned District Judge set himself to inquire what was the rent which the Assistant Collector found to be due in the litigation which terminated in this Court's decree of 5th January 1894.

Curiously enough there was no copy of the judgment of the Assistant Collector to be found on the record. The parties had caused to be summoned in the first Court the record of certain previous litigations, and it is possible that a copy of this particular judgment was to be found on one or the other of those files and was made the basis of argument by the parties in the Court of first instance. On the face of the record however there appears to be a serious lacuna in the evidence and it was for the District Judge to determine what he ought to do under the circumstances. The case for the present appellants I understand to be that it was the duty of the District Judge to hold the plaintiff responsible for the absence from the record of sufficient evidence as to the amount of the rent found due in the previous litigation. The appeal then before the Court, being an appeal by the plaintiff, would in that case have failed and the decree of the first Court would have been affirmed. The District Judge appears to have permitted, if he did not actually direct, the plaintiff (appellant before his Court) to file a copy of the judgment of the Assistant Collector. This he has endorsed with a simple order admitting it on to the record without giving any reason. That order bears the same date as the judgment which followed upon it and the learned District Judge seems to have thought that the statement of the facts set forth in his judgment was on the face of it sufficient justification for the course adopted by him.

It would be better if Courts of first appeal would be content to follow strictly the procedure laid down by O. 41, R. 27, Civil P. C., and specially by Cl. 2 of the said rule. At the same time, I am not prepared to hold under the circumstances of the present case that the learned District Judge did not exercise a judicial discretion in the admission of this evidence or that he exercised that discretion improperly or

irregularly so as to warrant the interference of this Court in second appeal. After all he was dealing with the record of a litigation which had taken place in his own Court. If he had simply sent for the file from his record room for inspection it is quite probable that no objection would have been taken, and yet it is in many ways more convenient that the facts connected with a previous litigation should be proved by the production of certified copies than by the inspection of record which might not come before a higher Court in the case of a subsequent appeal. For these reasons I find no adequate ground for interference in this case and I dismiss this appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 477

TUDBALL AND RAFIQUE, JJ.

Secy. of State—Opposite Party—Appellant.

v.

Abdul Salam Khan—Petitioner—Respondent.

First Appeal No. 379 of 1913, Decided on 23rd March 1915, from decree of Dist. Judge, Moradabad, D/- 7th June 1913.

Land Acquisition Act (1 of 1894), S. 36 (2)—Agricultural land acquired for quarrying "kankar" temporarily—Damages can be ascertained after expiry of the period of lease.

Where culturable land is acquired temporarily for the purpose of quarrying kankar therefrom, compensation for re-levelling the land and making it fit for cultivation shall be calculated at the expiry of the period for which the land has been temporarily acquired, inasmuch as it is impossible to say in advance what damage will be caused to the land and what it will cost to make that damage good.

[P 478 C 2]

A. E. Ryves—for Appellant.

Hameedullah—for Respondent.

Judgment.—This appeal arises out of proceedings taken under S. 35, Land Acquisition Act. Government acquired an area of 4 acres 20 poles, situated in the village of Manakpur Naroli, temporarily for a term of two years under the section for the purpose of quarrying kankar. The land was culturable land in the hands of tenants. Compensation was offered to the tenants for the period of their ouster and a sum of Rs. 105-6-0 was offered as compensation to the zamindar and it was explained to him that on the expiry of the

two years' term, he would be entitled to further compensation for any damage done to the land, under S. 36, Cl. (2), Land Acquisition Act. He objected to the amount offered to him and he put forward his plea in this way: that by reason of the kankar being dug the surface of the land would be lowered, earth would have to be brought from elsewhere to raise it and make it fit for cultivation. This being so he was entitled to two sorts of compensation, (1) to two years' rent for the period of occupation and (2) to compensation at the rate of Rs. 18 per bigha kham for levelling the ground and for bringing earth from other plots to make the ground fit for cultivation. This he put forward on 24th October before the Collector. The Collector refused to grant him any sum more than the amount offered and he applied for a reference to the District Judge.

Before the District Judge he again claimed the same compensation and asked for an order awarding compensation for levelling the ground after the two years. The learned District Judge awarded to him the sum of Rs. 198-8-0. He arrived at this figure by calculating approximately the amount of kankar which would probably be dug out of the area occupied and valued it at Rs. 7-8-0 per bigha. The total area being 26 bighas 19 biswas he awarded Rupees 198-8-0. Government has appealed and the respondent has also filed objections, claiming that he is entitled to compensation at the rate of Rs. 18 per bigha as he has all along claimed. In our opinion the method adopted by the learned District Judge is absolutely wrong. There was no question of the valuation of the kankar at all. The respondent put forward no claim thereto. He had asked merely for two years' rent plus compensation at the rate of Rs. 18 per bigha to cover the cost of re-levelling the land and making it fit for cultivation. We have to point out that the compensation offered by the Collector amounted to four times the annual rent paid by the tenants of the land. It is quite clear that the respondent is also entitled to compensation under S. 36, Cl. (2) of the Act, i.e., compensation which is to cover the cost of re-levelling the land and making it fit for cultivation. But an examination of the section will show that

this amount of compensation has to be calculated at the expiry of the period for which the land has been temporarily acquired. The reason of this is obvious for it is impossible to say in advance what damage will be caused to the land and what it will cost to make that damage good. The respondent has really in his petition asked for the payment of that compensation in advance. But he is not entitled to this in "this" proceeding. His application in respect thereto is premature. He only asked for two years' rent. The Collector awarded him four years' rent. In our opinion he has been liberally treated. We therefore allow the appeal. We set aside the award of the District Judge. We award to the respondent Rs. 105-6-0 as offered to him by the Collector in the beginning. It will still be open to him on the expiry of the period for which the land has been acquired to apply for the compensation mentioned in S. 36, Cl. (2), which he has claimed at Rs. 18 per bigha and in respect to which we express no opinion in the present proceeding. The objections are disallowed with costs and the appellant will have his costs in both Courts.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 478

RICHARDS, C. J. AND RAFIQUE, J.
Munni Koer—Plaintiff—Appellant.

v.

Madan Gopal—Defendant—Respondent.

Letters Patent Appeal No. 32 of 1915, Decided on 5th November 1915, from decree of Piggott, J. in Second Appeal No. 698 of 1913, D/- 6th January 1915.

Transfer of Property Act (4 of 1882), S. 54—Sale deed in favour of minor is valid—Minor can sue—Contract Act (9 of 1872), S. 11.

A sale-deed of a house executed in favour of a minor is a valid transaction and the minor can sue for possession of the same after the transaction is complete. 30 Cal. 539; 4 I. C. 383 and 11 I. C. 20, Ref. [P 479 C-2]

Suleman—for Appellant.

A. P. Dube—for Respondent.

Judgment.—By our order, dated 9th July 1915, we referred an issue to the Court below. The finding on this issue has now been returned. We think it desirable very shortly to refer to the nature of the suit. The plaintiff is the daughter-in-law of the defendant. The

suit is a suit to recover possession of a house. The house admittedly belonged at one time to the defendant. The house was under attachment in execution of a decree against the defendant. Before the sale, a deed of transfer was executed by the defendant in favour of the plaintiff. She was his daughter-in-law and her husband (the son of the defendant) was then alive.

It was alleged on behalf of the plaintiff that she paid the purchase-money of the house and became the purchaser. It was alleged on behalf of the defendant that the whole transaction was fictitious and that no consideration of any kind ever passed. As the result of the finding of the Court below upon the issue we referred, it is now established that the money was really paid by the father of the plaintiff at the time of the attachment and was duly received by the defendant. There can be no doubt (whether the money actually belonged to the plaintiff or belonged to her father) that the purchase was intended for her benefit. The question is whether under these circumstances, the plaintiff was entitled to recover possession of the property, it being borne in mind that at the date of the deed of transfer she was under age. It is contended on behalf of the defendant that the contract for sale of the house was absolutely null and void and the decision of their Lordships of the Privy Council in the case of *Mohori Bibi v. Dharmodas Ghose* (1) and also the case of *Navakoti Narayan Chetty v. Loyalinga Chetty* (2) are relied upon. On the other side the case of *Ulfat Bai v. Gauri Shankar* (3) and also the case of *Raghunath Bakhsh v. Haji Sherkh Muhammad Bakhsh* (4) are relied upon. S. 5, T. P. Act, defines 'transfer of property' as an act by which a living person conveys property to one or more other living persons, or to himself and one or more living persons. S. 6 Cl. (h), of the same Act sets forth the class of transfers of property which cannot be made. It does not state that a transfer cannot be made to a minor. S. 7 provides that every person competent to contract and entitled to transferable pro-

perty is competent to transfer such property. Nowhere in the Act is it provided that a minor is incapable of being a transferee of property, and as a matter of practice we are well aware that transfers of immovable property are every day made to minors. S. 127 by necessary implication shows that a person who is not competent to contract, may be the donee of immovable property, and that even in the case of property burdened with an obligation, if after he has become competent to contract and aware of the obligation, retains the property he becomes bound. It seems to us that the argument on behalf of the defendant amounts to this, that the present suit to recover possession of the house must be regarded in exactly the same way as if the plaintiff was bringing a suit for specific performance of a contract. In our opinion, it ought not be so regarded. It could hardly be said, if it was shown beyond all doubt that the father of the plaintiff entered into a contract for the sale of this property and instead of taking the conveyance himself had directed the vendor to execute the conveyance in favour of his daughter, that she would not be entitled to recover possession of the property. This in all probability was exactly what happened in the present case; but even if we assume on behalf of the defendant that it was the girl herself who entered into the contract and that it was her money which was paid to the defendant, it can make no difference. As soon as the defendant received the purchase-money and executed the conveyance, she became entitled to the possession of the property.

Very different considerations would arise if after having agreed to sell the property, the defendant before receiving the price had refused to execute a conveyance and the plaintiff was driven to a suit for specific performance. In such a case, the plaintiff would have to set up the contract. In our opinion, the decision of the Court below and also of the learned Judge of this Court were not correct. We accordingly allow the appeal, set aside both the decrees of the Courts below and also the decree of the learned Judge of this Court and decree the plaintiff's claim with costs in all Courts, including both hearings in this Court,

V.B./R.K.

Appeal allowed.

(1) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=5 Bom. L. R. 421 (P. C.)

(2) [1909] 23 Mad. 312=4 I. C. 383.

(3) [1911] 33 All. 657=11 I. C. 20.

(4) [1915] 18 O. C. 115=30 I. C. 200.

A. I. R. 1915 Allahabad 480

RICHARDS, C. J. AND PIGGOTT, J.

Mt. Kesar Kunwar—Defendant—Appellant.

v.

Kashi Ram—Plaintiff—Respondent.

Second Appeal No. 931 of 1914, Decided on 1st July 1915, from decree of Sub-Judge, Aligarh.

Transfer of Property Act (4 of 1882), S. 61—Condition of paying off subsequent mortgage money before redeeming first is not enforceable if subsequent mortgage is barred by time.

A simple mortgage was executed in favour of the mortgagee of the same property under a previous usufructuary mortgage with a covenant that the mortgagor would pay the money due under the second bond first and then that due under the usufructuary mortgage. The mortgagor brought a suit to redeem the first mortgage at a time when a suit to recover the money due under the second bond was barred by limitation:

Held, that the mortgagor was entitled to recover possession of the property without paying the money due under the second mortgage.

[P 481 C 1]

Sarat Chandra Chaudhri—for Appellant.*Tej Bahadur Sapru*—for Respondent.

Judgment.—This appeal arises out of a suit brought to redeem certain property which was made the subject of a usufructuary mortgage, dated 13th February 1880. The principal sum secured was Rs 900, and the mortgage deed expressly provided that the usufruct was to go against the interest and that the mortgagor should not be entitled to an account from the mortgagee of the profits. The defence to the suit was that there had been a subsequent mortgage dated 7th July 1882, and that under the terms of this mortgage plaintiff could not succeed in the present suit without first paying off the amount due for principal and interest under the last-mentioned mortgage. The first Court gave effect to the defence and dismissed the suit. The lower appellate Court allowed the appeal.

The second mortgage was for a sum of Rs. 95, repayable with interest at the rate of 30 per cent. per annum. The deed, after reciting the facts that the property had been previously mortgaged contains the following provisions:

"It is further stipulated that I should first pay the money due under this bond, and after that I should pay the mortgage money."

It is clear from the terms of this mortgage, taken in conjunction with the fact

that the whole usufruct was to be applied to the keeping down of interest upon the first mortgage, that the second mortgage was in fact a simple mortgage. So long as it remained unpaid the interest would accumulate at the rate of 30 per cent. per annum, and according to the covenant the money due thereunder for principal and interest must be paid before the mortgagor redeemed the first mortgage. No principal or interest had ever been paid upon foot of this second mortgage. At the date of institution of the present suit a suit to enforce payment of the second mortgage would be barred by limitation, unless it can be said that on the true construction of the deed it was not open either to the mortgagor to pay off the amount due, or to the mortgagee to bring a suit until such time as the mortgagor was ready to redeem the earlier mortgage. It seems to us absolutely clear that if the mortgagor, a year after the execution of the second mortgage, had tendered the sum of Rs. 95, plus a year's interest thereon, the mortgagee would have been legally bound to accept the same. He certainly could not have refused the tender by reason of the stipulation in the second bond that the mortgagor should pay the money due thereunder before he paid the mortgage on the earlier bond. Just in the same way we consider that if the mortgagee had brought a suit to enforce the second bond the mortgagor could not have successfully pleaded that such suit was premature.

The result is that we must take it that had a suit been brought on 8th August 1912 (that is, the day on which the written statement was filed) on the second mortgage, the same would have been barred by limitation. We will assume that had the plaintiff brought the present suit before the second mortgage was barred by limitation and had the defendant pleaded that the first mortgage could not be redeemed until after the second had been paid off, the plea would have been a good one. The question remains whether such a plea is still good notwithstanding that the defendant is barred from maintaining any suit to enforce the second mortgage. In effect the defendant is asking the Court to enforce against this property a claim which is barred by time. We think that this

cannot be done and that the plaintiff is now entitled to recover possession of property upon payment of the amount secured by the original mortgage. We dismiss the appeal with costs.

V.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 481

KNOX, J.

Shohrat Singh—Plaintiff—Appellant.

v.

Jhagru and others—Defendants—Respondents.

Second Appeal No. 492 of 1914, Decided on 1st June 1915, from decree of Addl. Sub Judge, Gorakhpur.

Landlord and tenant—Abadi—Landlord, owner of—Right to house site is co-extensive with tenancy.

In the United Provinces ordinarily the zamindars are under Government owners of every inch of ground within a mahal whether that ground be cultivated or waste. If anyone other than the zamindar seeks to establish a title to any portion of the land, the burden is on him to prove the special circumstances or special contract under which he claims title.

As long as the tenant cultivates the land in the village he will remain. If he abandons or is ejected from the tenancy then, unless there be some special custom or contract to the contrary, the site reverts to the zamindar and the tenant who built the house at his risk has to remove his materials and vacate the site.

[P 483 C 1, 2]

Ramakant Malaviya—for Appellant.

Nihal Chand—for Respondents.

Judgment.—The plaintiff in the Court of first instance is admittedly, the zamindar of Mauza Kataila. According to him the defendants were non-occupancy tenants who have been recently ejected from their cultivatory holdings in Mauza Kataila. He says that the defendants in the time of his predecessor, and with the permission of his predecessor, built a dwelling house and a cattle-shed for the purpose of agriculture. As the defendants have been ejected from all the cultivatory holdings, he contends that they have no longer any right of residence on the land in dispute. He asked them on several occasions to quit; but they have failed to do so. His prayer to the Court was that he might be given a decree for possession of 5 biswas of pukhta land as set out in the plaint and the defendants directed to remove their materials from the land.

The defendants in their written reply took up the position that the house built by them was built for all purposes for

which a house could be used. It had been in existence for more than 12 years, indeed for many generations, hence the plaintiff is not entitled to recover possession. The Court of first instance had no hesitation in awarding the plaintiff a decree. It held that the house was appurtenant to the agricultural holding and that when a tenant ceases to have any holding, his right of occupation in the abadi cases,—this, of course, in the absence of a special contract to the contrary and in this case no special contract was pleaded. It accordingly gave the plaintiff a decree for ejection.

The defendants went in appeal and their contention in appeal was practically the same as in the Court of first instance, with this addition that there can be no presumption in law regarding the house of a tenant that that house was built merely for agricultural purposes. They laid stress upon the house being a very big one, consisting of three sections, defendants had always considered it their place of residence, made additions to it from time to time, and the suit was time barred. It will be noted in these pleadings that no suggestion has been made at any stage of the case that the defendants are possessed of more than one house in the abadi. The lower appellate Court held that there were two points before it for determination; the first point that it laid down was whether the house in dispute was or was not appurtenant to the agricultural holding. Secondly, it said that there was absolutely no evidence on the record to show that the house site was an appurtenance to the agricultural holding. There was no presumption in law that the house occupied by a tenant was of necessity an appurtenance to the cultivatory holding. The learned Subordinate Judge said that he could find no precedent to this effect. On the contrary, he referred to the case of *Moti Ram v. Munna Lal* (1) and to the case of *Net Ram v. Tej Ram* (2). As he understood these judgments he held that there was no presumption that a site occupied by a dwelling house of every agricultural tenant was necessarily an appurtenance to the agricultural holding. The question was a question of fact and not of law and it rested with the plain.

(1) S. A. No. 1119 of 1911 decided on 28th October 1912.

(2) [1913] 20 I. C. 260.

tiff zamindar to prove that the house was the appurtenance of the tenancy. In the present case there was no evidence that the defendants held the site as an appurtenance; they must be held to have occupied the site adversely to the plaintiff and his predecessor and they are now owners.

This is a startling proposition. It amounts to this: that when the zamindar wishes to eject a tenant, who has been ejected from his tenancy, from the house occupied by him he must come into Court prepared with the proof that at the beginning of their relations the zamindar granted the respondent-tenants their position in the abadi as appurtenant to their holding. If the zamindar cannot prove this, the tenants must be held to have occupied the site adversely to the zamindar, and, if they had been in possession long enough, to be the owners of the house in dispute. The zamindar has come to this Court in appeal and has taken five pleas. First, that the Court below has erred in holding that the sites are not appurtenances to the holdings from which the tenants have been ejected. Secondly, that, the Court is in error when it says that, as there is no evidence that the tenants held the sites as appurtenances, they must be held to have occupied the sites adversely to the plaintiff and his predecessors and have now become owners; thirdly, that it was for the defendants to prove that they occupied the land adversely to the zamindar. The remaining two pleas do not call for any notice. It must be remembered that throughout the present case there is no suggestion that the defendants have been occupying more than one house. The judgment speaks of sites, but on looking at the plaint I find that the plots are a house and a cattle-shed. There is no suggestion moreover from first to last that there was any special contract made between the original tenants and the original zamindar at the time of their entering into possession. It is the ordinary case of a site in the village abadi. The cases on which the learned Subordinate Judge has relied are not precedents that can be followed in the present case. The circumstances in each case were different from the circumstances here. In *Moti Ram v. Munna Lal* (1), the house in dispute was admittedly a house built and tenanted for agricultural pur-

poses and the contention was that by a special custom prevailing in the village such a house could be sold. It is true that the learned Judge of this Court before whom the case came used these words:

"There is no legal presumption that every dwelling house belonging to an agriculturist is appurtenant to his holding. A house may or may not appertain to the holding, and the fact whether it does appertain to the holding must be established in each case upon the evidence."

But the learned Judge never went on, as the learned Subordinate Judge in this case, to lay down that if a plaintiff failed to prove that the defendant held the house as appurtenance, the defendant must be held to have occupied the house adversely and to be the owner thereof.

In *Moti Ram v. Munna Lal* (1), the zamindar was not a party to the suit; the contending parties were the mortgagees of a grove and of the house in the abadi and the defendants were the mortgagors. In *Nel Ram v. Tej Ram* (2), the contention was that the land in dispute was a piece of waste land in the abadi which the cosharers of the village had permitted the defendants to use for stacking manure and keeping cattle and the house occupied by the tenant was not in dispute at all. The learned Judge in his judgment says:

"In the abadi of a village the house of a tenant is the only thing that can be said to be an appurtenance to his holding."

What is an appurtenance to the holding of an agricultural tenant, he held, must be decided according to the circumstances of each case. In the case before him the defendants had got a large area of land to cultivate, for which they required a number of bullocks and other accessories and they must have a piece of land for their cattle and manure. And if the plot in suit had been allowed to remain in their possession for more than 20 years by the zamindars of the village for the use of cattle and manure, the plots had become an appurtenance to the agricultural holding of the defendants. In this case too the extraordinary decision was not arrived at, that if the plaintiff did not prove that the land in dispute was an appurtenance, the defendants, if they held possession for more than 12 years, had acquired a title by adverse possession and had become owners of the property in dispute. It seems to me that a decision of this kind

shows a complete ignorance of the ordinary position in these provinces of zamindars and tenants with reference to a site in the abadi; ordinarily the zamindars are, under Government, owners of every inch of ground within a mahal, whether that ground be cultivated or waste. If any one other than the zamindar seeks to establish a title to any portion of this land, the burden is on him to prove the special circumstances or special contract under which he claims title. There are undoubtedly cases in which it can be established, and is established, that adverse possession has been held and maintained for a sufficient number of years and that proprietorship has passed away from the zamindar, but the presumption is the other way. The zamindar admits a tenant into the village and in order to keep him contented and happy grants him a portion of the land within the so-called abadi and in some cases no doubt gives him permission to use other portions of the abadi for other purposes; but the tenant comes in as a tenant of the zamindar both as regards the cultivatory land and the site or sites in the abadi. It is contrary to common sense that the zamindar would let a person occupy any portion of the land in a mahal except for purposes connected with the village. If the person in possession sets up a title adverse to the zamindar, it is for him to prove how he acquired the title. The learned Munsif was quite right in holding that the presumption was in favour of the site occupied being an appurtenance to the tenancy. Circumstances are quite different if it be the case that more than one site is held by the contesting quondam tenants, but I need not discuss that question in this judgment, for that is not the case before me. The contention that the house was built for every purpose for which a house can be built is not entitled to much weight. The zamindar knows that the site in the abadi is his by right and that the tenant must know the same. If the tenant chooses to build on the site allotted to him by the zamindar a three storeyed house or some house out of the common, the zamindar is not bound to go and expostulate with him for having built such a house. As long as the tenant cultivates the land in the village he will remain. If he abandons, or is ejected from the tenancy, then, unless there be some spe-

cial custom or contract to the contrary, the site reverts to the zamindar and the tenant who built the three storeyed house at his risk has to remove his materials and vacate the site. This is the general law of the land in my opinion.

The result then is that I allow the appeal, set aside the decree of the lower appellate Court and restore that of the Court of first instance with costs in all Courts.

V.B./R.K.

Appeal decreed.

A. I. R. 1915 Allahabad 483

RICHARDS, C. J. AND BANERJI, J.

Puran Mal—Defendant—Appellant.

v.

Tarif and others—Plaintiffs—Respondents.

Second Appeal No. 1080 of 1914, Decided on 20th July 1915, from decision of Dist. Judge, Meerut, D/- 23rd May 1914.

(a) Evidence Act (1 of 1872), S. 21—Admissions in written statements cannot be used against other defendants.

A statement made by a defendant in his written statement is not admissible in evidence against his co-defendant. [P 484 C 1]

(b) Civil P. C. (5 of 1908), O. 9, R. 13—Order granting application is not appealable and cannot be questioned in appeal on final decree.

An order setting aside an ex parte decree is not appealable and as such it cannot be questioned in appeal from the final decree passed after restoration. [P 484 C 2]

Kailash Nath Katju and Tej Bahadur Sapru—for Appellant.

Baldeo Ram Dave for Sundar Lal—for Respondents.

Judgment.—This appeal arises out of a suit brought by an alleged reversioner against the transferors of a deceased Hindu widow. The Court of first instance dismissed the plaintiffs' suit. The lower appellate Court reversed the decree and decreed the plaintiffs' claim.

The widow was one Mt. Hukmo. She made an alienation of the whole property as far back as the year 1888 in favour of one Shibba. Shibba on 16th May 1896 transferred part of the property so alienated to him to the defendant *Puran Mal*. The Court of first instance found that Mt. Hukmo had died some 18 years before the institution of the suit, giving somewhat cogent reasons for its finding. The lower appellate Court found the utmost difficulty in believing the plaintiffs' story as to the date of the death of Mt.

Hukmo. It appears however that when the present suit was first instituted, in addition to Puran Mal the two daughters-in-law of Shibba were made parties. The plaintiffs in their plaint had alleged that Mt. Hukmo had died a year before the institution of the suit. The two lady defendants in their written statement had said that Mt. Hukmo died four and quarter years before the institution of the suit. The ladies do not appear to have taken any further step of any kind in defending the suit, and in the first instance it was decreed *ex parte*. Puran Mal subsequently applied to have the *ex parte* decree set aside and was successful. The learned District Judge, after stating that he does not believe the plaintiffs' evidence as to the date of the death of Mt. Hukmo, proceeded as follows:

"The fact that Mt. Misri and Mt. Manno said originally that Hukmo died four years ago is to my mind the one piece of untainted evidence in the whole case and I would be prepared to accept it. By their admissions Mt. Misri and Mt. Manno stood to lose that portion of the property of Har Narain held by Mt. Hukmo which she had passed to Shibba."

It is certainly somewhat suspicious that the Musammats who never fought out the case should have been so particular to allege the date of the death of Mt. Hukmo. It is also somewhat remarkable that the plaintiffs at once accepted the date and had their plaint amended. The two Musammats had absolutely nothing to gain by putting in their written statement that Mt. Hukmo died four and a quarter years before the suit. It could not have helped them in any way in making a defence to the suit. Their motive for making the statement is very obscure, unless they intended to help the plaintiff. Why the plaintiffs should have amended their plaint when they were getting an *ex parte* decree is also not very clear. However, in our opinion, the statement made by these ladies in their written statement was not evidence against Puran Mal. The ladies were not called as witnesses. It is clear therefore that if the statement of the ladies be excluded in the opinion of both the Courts below the plaintiffs failed to prove the death of Mt. Hukmo within 12 years of the institution of the suit. The onus undoubtedly lay upon the plaintiffs of proving the death of Hukmo within 12 years, so as to show that they had a subsisting

title at the date of the institution of the suit. The learned District Judge has however decreed the plaintiffs' claim on the ground that the trial Court ought never to have set aside the *ex parte* decree. In our opinion the question of the propriety of setting aside the *ex parte* decree was a matter which could not be considered by the learned District Judge in appeal. No appeal is given by the Code from an order setting aside an *ex parte* decree. It cannot be taken exception to later on in a regular appeal, because it did not affect the merits of the case. This has been repeatedly held by this Court. In our opinion the decree of the Court of first instance was correct and ought to be restored. We accordingly allow the appeal, set aside the decree of the lower appellate Court and restore the decree of the Court of first instance with costs in all Courts, including in this Court fees on the higher scale.

V.B./R.K.

Appeal allowed.

A. I. R. 1915 Allahabad 484

RICHARDS, C. J.

Rup Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 780 of 1915, Decided on 29th October 1915, against order of Dist. Magistrate, Mainpuri.

Criminal Trial—Complaint by Magistrate—He should not pass order in that case.

A Magistrate ought not to make any order in any case in which he is even the nominal complainant. [P 485 C 1]

Satya Chandra Mukerji - for Applicant.

Assistant Government Advocate - for the Crown.

Judgment.—This is an application in revision against the order of the District Magistrate. It appears that there was a suit in the Small Cause Court in 1912 in which *Rup Lal* was plaintiff. The suit was a suit on a bond. It is alleged that the bond was a forgery. Application was made by the then District Magistrate to the Judge of the Small Cause Court for sanction to prosecute. This sanction was granted and the case was taken cognizance of by the District Magistrate who sent it on to a Magistrate of the First Class. The result of his inquiry was that the accused *Rup Lal* was discharged. The prosecution considered it desirable that there should

be further enquiry and that the propriety of the order of the Magistrate discharging Rup Lal should be considered. The application was made to the District Magistrate. He directed Rup Lal to show cause why the order discharging him should not be set aside. Counsel appeared on behalf of Rup Lal. No exception was taken to the District Magistrate hearing the case and he ordered that the order of discharge be set aside. In the present application, it is argued that the District Magistrate has all along been the complainant and that the present District Magistrate is the complainant notwithstanding that the original complainant was his predecessor-in-office and that a District Magistrate who is a complainant ought not to make any order in the case. It is further contended that the order of the Magistrate, who discharged Rup Lal is correct and ought not to be interfered with.

In my opinion, if the order discharging Rup Lal was wrong, there is no reason why it should not be set aside. But I do not desire to express any opinion on the correctness or incorrectness of the order of discharge. While I think it is to be regretted that the attention of the learned District Magistrate was not called to the fact that he was the nominal complainant it is nevertheless clear that a Magistrate ought not to make an order in any case in which he is even the nominal complainant. I think that the order should be set aside and it will be for the Crown to consider whether it is expedient to move further in the matter. If it is considered expedient to move an application can be made to the Sessions Judge who has jurisdiction in the matter. I accordingly set aside the order of the District Magistrate dated 5th August 1915.

V.B./R.K.

Order set aside.

A. I. R. 1915 Allahabad 485

KNOX, J.

Emperor

v.

Panchu and another—Opposite Party.
Criminal Revn. Petn. No. 508 of 1915,
Decided on 25th October 1915, from
order of Dist. Magistrate, Gorakhpur.

Evidence Act (1 of 1872), S. 27—Confession—Pointing out of dhatura tree by accused to police—Statement is not admissible.

In police investigation of a case under S. 328, I. P. C., the accused said to the darogha:

"I gave seed of dhatura." On being asked from where the seed came, the accused pointed out to the officer a dhatura tree.

Held: that the statement was inadmissible in evidence. [P 485 C 2]

Judgment.—Read explanation furnished by the District Magistrate. It appears that in the course of a police investigation into a charge under S. 328, I. P. C., the prisoner Indrason pointed out a dhatura tree and said "from this I took the fruit." The fact of pointing out the dhatura tree and the words accompanying it were deposed to by the witness Ablakh. The same witness was allowed to say further:

"He (meaning the Sub-Inspector) asked Indrason who gave the *gur* and Indrason said he gave it. He also said "I gave seed of dhatura." The darogha said "where did you bring the seed." He said "there was tree at Chhillor Ahir's Kala." The darogha said "come and point out." All of us went."

There can be no doubt whatever that the whole of the statement above recited was inadmissible as evidence. No fact is deposed to as discovered in consequence of the information said to be given by Indrason. If we take it that the fact of the dhatura tree was a discovery in consequence of the information received from Indrason, then and then only such information as related distinctly to the fact thereby discovered might be proved. The fact that Indrason pointed out the tree and said that from it he took the fruit is all that related to the fact thereby discovered. But, as pointed out by West, J., in *Reg. v. Jora Hasji* (1):

"It is not all statements connected with the production or finding of property which are admissible; those only which lead immediately to the discovery of property, and so far as they do lead to such discovery, are properly admissible. ... Other statements connected with the one thus made evidence, and so mediately, but not necessarily or directly, connected with the fact discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the police. For instance, a man says: "you will find a stick at such and such a place. I killed Rama with it." A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible."

By similar reasoning the evidence of Ram Gobind quoted by the learned Magistrate is equally inadmissible as

evidence and should have been rigorously excluded. Let the record be returned.

v.B./R.K.

Record returned,

A. I. R. 1915 Allahabad 486 (1)

RICHARDS, C. J. and BANERJEE, J.

Mahomed Hashmat Ali and another—
Plaintiffs—Appellants.

v.

*Kaniz Fatima and others—*Defendants
—Respondents.

Second Appeal No. 228 of 1914, Decided on 8th January 1915, from decision of Sub-Judge, Moradabad.

Transfer of Property Act (4 of 1882), S. 6—Contract not to claim property by inheritance in future for good consideration is not illegal.

There is nothing illegal in a person, for good consideration, contracting not to claim a share in a property in the event of his becoming entitled to it on the decease of a living person.

[P 486 C 1]

*B. E. C'Conor and Tej Bahadur Sapru—*for Appellants.

*Mahomed Abdul Majid and Hamid-ullah Khan—*for Respondents.

Judgment.—This appeal arises out of a suit for partition. The defence was that many years ago one Khurshed Jahan, through whom the plaintiffs claim, compromised certain disputes by abandoning not only all rights which were then vested in her, but also the possibility of her succeeding to shares as one of the heirs of her mother. There is no doubt that a suit was compromised by the lady upon these terms and that the compromise was acted upon, an arbitration held and the award incorporated into a decree in accordance with the award. It is contended on behalf of the appellants that under the provisions of S. 6, T. P. Act, it is impossible for any person to transfer the chance of becoming entitled to a share in the property of a living person. This no doubt is quite correct, but it seems to us that there is nothing illegal in a person, for good consideration contracting not to claim in the event of his becoming entitled on the decease of a living person. This is in reality the substance of what happened in the year 1868. We accordingly agree with the view taken by the Court below and dismiss the appeal with costs.

v.B./R.K.

Appeal dismissed.

A. I. R. 1915 Allahabad 486 (2)

RICHARDS, C. J. AND RAFIQUE, J.

*Jaikaran and others—*Defendants—
Applicants.

v.

*Janki Sahu and others—*Plaintiffs—
Respondents.

Privy Council Appeal No. 16 of 1915, Decided on 5th November 1915.

Civil P. C. (5 of 1908), S. 110 (2)—Value of interest held not over Rs. 10,000 and leave was not granted.

Certain suits for declaration of ownership in respect of certain plots were valued in all at above Rs. 10,000 and were tried together. The suits were dismissed. One of the suits was valued at above Rs. 5,000 and an appeal was filed to the High Court. The High Court decreed the suit and the defendant applied for leave to appeal to His Majesty in Council on the ground that the decree "directly or indirectly involves some claim or question to or respecting property of more than Rs. 10,000" inasmuch as a large amount of money was expended on the plot in question which was a garden.

Held: that under the circumstances of the case the value of the defendant's interest was not over Rs. 10,000 and that therefore no leave could be granted. [P 488 C 2]

*M. L. Agarwala—*for Applicants.

*Lakshmi Narain Tewari—*for Respondents.

(Facts appear in the following judgment delivered in First Appeal No. 98 of 1913, decided on 23rd March 1915.)

Richards, C. J. and Banerji, J.—

This appeal arises out of a suit in which the plaintiffs claimed that they might be declared to be the owners of a plot of land specified in the plaint, and that the defendants had no right thereto. The defendants were at one time undoubtedly the zamindars of the plot in suit and other plots, and the plaintiffs were tenants in the village. Prima facie therefore the plaintiffs' claim requires careful scrutiny and consideration. At first sight it is not very probable that the zamindars would confer absolute ownership on tenants. There are however, some very remarkable circumstances connected with the case, which are established beyond all doubt. The plot of land in dispute in this appeal forms portion of what was at the time of the institution of the suit, and now is a substantial garden enclosed by brick walls with an area of three bighas odd. The plaintiffs say that they have been in possession for 14 years. Whether they were in possession as long as 14 years or not, beyond doubt they were a very long time in possession. On the

defendants' own showing they have been there since the year 1903. The plaintiffs alleged that they had spent no less than Rs. 27,000 on the three bighas odd of land in erecting walls, sinking wells, constructing buildings and planting trees. The amin reported that Rs. 20,000 had been spent. It is not very easy now to ascertain the actual amount, but beyond question a very large sum was expended on a small area of land. The defendants stood by and saw the walls and buildings being erected, the wells being sunk and trees being planted, and never moved in any way. Finally, however in the year 1911 they served a notice on the plaintiffs calling upon them to take out lease for a fixed period of the major portion of what comprises the bagh. Their next step was to bring a suit in the Revenue Court, alleging that the plaintiffs were mere non-occupancy tenants from year to year and therefore liable to immediate eviction. There was no suggestion that the plaintiffs had got possession of the land upon terms which they had unreasonably and dishonestly refused to carry out.

The plaintiffs in the Revenue Court pleaded that they were the owners of the land, with the result that the Revenue Court referred them to the civil Court to establish their title. The consequence was the institution by the plaintiffs of the present suit and several others which, we are informed, are pending in appeal before the District Judge of Gorakhpur. It will thus be seen that the persons who are responsible for starting the litigation are not the plaintiffs in the present suit, but the defendants who sought to take away from the plaintiffs the fruits of their expenditure. The plaintiffs' story is that a good many years ago the defendants or their predecessors in title sold to them the various plots which now make up the garden, the total sum paid being Rs. 470. They say that the interests of the several owners were very small and that the interests of no one of the vendors was of the value of Rs. 100, that having purchased the land they proceeded to make the large outlay which undoubtedly was made. The evidence of the plaintiffs about the sale is uncontradicted and it seems to us that a reasonable inference from the evidence is that the plaintiffs entered into a sepa-

rate transaction with the owner of each plot. We see no reason to disbelieve the story that any one plot was sold for a larger sum than Rs. 100. We might have some difficulty in believing the story of the alleged sale, unsupported as it is by any documentary evidence, had it not been for the strong corroboration afforded by the large expenditure on the plot and the acquiescence by all the zamindars in the expenditure and in the treatment of the land. It is not conceivable that the plaintiffs would have made so large an outlay in a small area of land if they were liable to eviction. If they had purchased the land it would explain the outlay. The defendants, who are responsible for the litigation, have not told us a story that would be more probable and at the same time explain why the plaintiffs spent so large a sum. We think therefore we should accept the plaintiff's version. It is next said that there was no legal necessity for the sale of the land. In our opinion the circumstances of the present case indicate in the strongest manner possible that every sale was made by the managing members of the joint undivided Hindu families. This in substance is not disputed.

It is suggested now that there must have been some arrangement between the plaintiffs and the defendants, or their respective predecessors-in-title, as to the use to which the plaintiffs were to put the land, and there may very well have been some arrangement about sharing in the fruits. As already stated, the defendants have told nothing about such an arrangement. They did not do so when they originally served the plaintiffs with notice, nor in the Revenue Court, nor in the Court below. They have tried to treat the plaintiffs as persons who were liable to eviction as non-occupancy tenants from year to year. If as the result of their own dishonesty they have lost some right they have only themselves to blame. It seems to us that in a dishonest way they commenced the present litigation. In the absence of all reasonable explanation, from the defendants, we think that we ought to believe the plaintiffs story which is consistent with the circumstances which are proved, the story being that the plaintiffs purchased the property from the owners at a fair and proper value and thereupon proceeded to expend a very large sum in enclosing the land, planting

trees and improving it. We think that under the circumstances of the present case the plaintiffs were entitled to the declaration which they sought. We accordingly allow the appeal, set aside the decree of the Court below and decree the plaintiffs' claim with costs in both Courts, including in this Court fees on the higher scale.

Richards, C. J.—This is an application for leave to appeal to His Majesty in Council. This Court reversed the decision of the Court of first instance. The value of the suit in the Court of first instance was less than Rs. 10,000, and the value of the proposed appeal to His Majesty in Council is less than Rs. 10,000. The facts of the case fully appear from the judgment of this Court, dated 23rd March 1915, [given above] and we certainly do not feel in a position to certify that the case is "otherwise a fit one for an appeal to His Majesty in Council." It is contended however that Cl. (2),

S. 110 applies, because, although the value of the original suit or of the proposed appeal does not exceed Rs. 10,000, nevertheless the decree

"directly or indirectly involves some claim or question to or respecting property of more than Rs. 10,000."

It cannot for a moment be suggested that the value of the applicants' interest is over Rs. 10,000. It is however urged that the opposite side admitted in the Court below that a very large amount of money has been expended on the garden and that therefore the decree of this Court affects property of upwards of Rs. 10,000. In our opinion, the case does not come within the meaning of S. 110, Cl. 2. The proposed appellant has no concern whatever with the money which the opposite side expended upon the garden. We reject the application with costs.

V.B./R.K.

Application rejected.

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